IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1432

STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION OF STANDARD OIL COMPANY OF CALIFORNIA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

CASES:

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Petitioner Standard Oil Company of California requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this consolidated proceeding on February 23, 1977.

OPINION BELOW

The *en banc* opinion of the Court of Appeals, not yet reported, appears in the appendix hereto at A1.[1] The District Court decision is included as an appendix to the decision of the Circuit Court and is also printed as part of the appendix to this petition at A57. The unanimous panel decision of the Circuit Court, which four judges of the *en banc* Court reversed, is reported at 517 F.2d 137 (1975) and is included in the appendix at A169.

JURISDICTION

The *en banc* judgment of the Court of Appeals was entered on February 23, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a district court enforcing Federal Trade Commission subpoenas has jurisdiction to determine issues of relevancy, burden and confidentiality, and to modify subpoenas accordingly.

2. Whether, in a subpoena enforcement proceeding, district court findings respecting the scope of a Federal Trade Commission investigation, based on representations to the court by the Federal Trade Commission, are factual in nature and hence subject to review only for clear error or abuse of discretion.

3. Whether a district court enforcing Federal Trade Commission subpoenas has discretion to narrow their

[1] The *en banc* Court consisted of six judges, of whom two dissented. The dissenting opinion is set forth at A69 in the joint appendix filed by all petitioners from the consolidated proceeding. The majority issued an order modifying its original opinion by adding a footnote thereto. See appendix at A165.

breadth with respect to factual issues recently considered and determined by the Federal Power Commission, in order to avoid unnecessary compliance burdens.

4. Whether the Federal Trade Commission in an investigation pursuant to § 5 of the Federal Trade Commission Act can be collaterally estopped with respect to factual issues recently subject to a final determination in a ratemaking proceeding of the Federal Power Commission.

STATUTE INVOLVED

This case involves enforcement by the District Court of administrative subpoenas *duces tecum* issued by the Federal Trade Comission. 15 U.S.C. § 49 (1970) provides in relevant part:

> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

STATEMENT OF THE CASE

Background

The subpoenas here in question were directed to certain natural gas producers including Petitioner in an investigation of possible violations of § 5 of the Federal Trade Commission Act.[2] The FTC investigation arose out of allegations that natural gas producers were un-

[2] The subpoena text is reproduced in the appendix at A46.

der-reporting proved reserves of natural gas in Southern Louisiana through the American Gas Association (AGA). Since 1946 producers have reported to the AGA individual proved reserves, and the AGA has provided industry, government and the public with annual estimates of proved reserves of natural gas and natural gas liquids in the United States. In 1969 the AGA reported the first annual decline of natural gas reserves in the United States. That decline was one of the earliest harbingers of the present energy crisis and elicited widespread concern. It was asserted in Congress that the reported decline in proved reserves did not accurately represent the availability of natural gas in this country, but was instead the result of alleged collusive reporting by natural gas producers, upon whose reports the AGA estimates are based. The FTC investigation pursuant to which the instant subpoenas were issued was undertaken in response to that assertion.[3]

The Federal Power Commission

As part of its statutory responsibility to regulate gas prices, the Federal Power Commission had, just prior to the AGA's 1969 report, concluded a proceeding to establish area-wide rates for Southern Louisiana, the largest natural gas producing area in the United States (So La I).[4] Because of the growing shortage of natural gas the FPC, almost immediately after that proceeding, commenced a second proceeding to reconsider rates for Southern Louisiana gas (So La II). The main purpose of the new investigation was to determine whether, in

[3] See App. at A7.

[4] *Area Rate Proceeding (Southern Louisiana),* 40 FPC 530 (1968), *modified on rehearing,* 41 FPC 301 (1969), *aff'd sub nom. Austral Oil Co.* v. *FPC,* 428 F.2d 407 (5th Cir.), *cert. denied,* 400 U.S. 950 (1970), *aff'd per curiam,* 444 F.2d 125 (5th Cir. 1970).

light of the diminishing supply, higher area rates were required. In response to the contention of a party to the FPC proceeding that the shortage was illusory because of alleged manipulations of AGA data, the FPC investigation considered the reliability of AGA data and the producers' reports. The FPC's proceeding was adversarial in nature and testimony was subject to cross examination. In its investigation, the FPC ordered the producers to complete special questionnaires concerning reserves. The completed questionnaires were subject to a staff audit. The FPC concluded its proceeding in July, 1971. It rejected the false-reporting charge and found that AGA estimates were an adequate basis for ratemaking. That decision was affirmed by the Fifth Circuit and this Court.[5]

Subsequently, the FPC undertook, at the direction of Congress, a comprehensive independent survey of natural gas reserves which did not rely on the AGA figures at any point. The final report issued in May 1973 concluded that the AGA estimates of reserves were, if anything, too high.[6]

The Federal Trade Commission

In late 1970 the FTC initiated *its* investigation into the reporting of natural gas reserves in Southern Louisiana. From the beginning of the investigation the AGA cooperated voluntarily. Substantial quantities of data and documents were produced from company and AGA files, including the field-by-field esti-

[5] *Area Rate Proceeding Offshore Southern Louisiana,* 46 FPC 84, 114-16 (1971), *aff'd sub nom. Placid Oil Co.* v. *FPC,* 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp.* v. *FPC,* 417 U.S. 283 (1974).

[6] FPC Staff Report on National Gas Reserves Study (May 1973). See App. at A87.

mates of proved reserves made by each Southern Louisiana subcommittee member in 1966 through 1970. Members of the AGA subcommittee voluntarily gave depositions. *See* App. at A8-9, A72.

On June 3, 1971, the FTC issued a resolution authorizing compulsory process, and on November 24, 1971—after the FPC had concluded its proceeding in So La II—the FTC staff issued the instant subpoenas to eleven natural gas producers including Petitioner. The exceedingly broad subpoenas sought massive quantities of proprietary technical data and estimates of every type respecting natural gas reserves including, but by no means limited to, the producers' "treasure maps". All producers promptly moved to quash. The Commission denied the producers' motions on June 27, 1972.[7]

The District Court

As authorized by § 9 of the Federal Trade Commission Act, petitions for enforcement of the subpoenas were filed in the District Court on June 4, 1973. A hearing on preliminary motions was held on July 30, 1973. After briefing and submission of evidentiary materials by the producers and the FTC, a full hearing on the issues was held on December 13, 1973. The District Court issued an order on March 22, 1974, enforcing six of the subpoenas' twelve specifications in full, and six in part. The order upheld the FTC's right to conduct an investigation, but noted the contentions of Petitioner and other producers that compliance with the subpoenas as issued would be needlessly burdensome and irrelevant to any proper subject of investigation. The order further took account of the fact that the FPC had already investigated the

[7] App. at A258. Subsequently, three of the eleven complied with modified subpoenas. *Id.* at A10-11.

accuracy of the natural gas reserve estimates and found them reliable. Accordingly, the District Court approved the subpoenas with modifications:

(a) Compliance was ordered respecting documents concerning *proved* reserves, the only estimates reported by the AGA, thus eliminating highly speculative and commercially sensitive data concerning unproved deposits.

(b) Initial compliance was ordered respecting 100 fields to be selected at random from the approximately 225 fields subject to the original subpoenas.

(c) Compliance was ordered respecting the years 1969-1971.

(d) Certain specifications were limited to the offshore area.

(e) Confidentiality protections were ordered and the companies were permitted to produce documents where stored.

The District Court specifically retained authority to grant the FTC further discovery.

The Circuit Court

The FTC did not avail itself of any of the relief it obtained from the District Court, but instead appealed those portions of the District Court's order limiting the subpoenas. On August 8, 1975, a three judge panel unanimously upheld the District Court's order in all respects except the provision limiting production to the years 1969-1971 which was extended to the full period sought by the FTC.[8] At that point, the FTC, still not proceeding with either the discovery the Dis-

[8] The panel included Circuit Judges Wilkey and MacKinnon and District Judge Jameson, the latter sitting by designation pursuant to 28 U.S.C. § 294(d).

trict Court permitted or the additional discovery permitted by the panel, petitioned for and received rehearing *en banc*. A four-judge majority of the *en banc* Court, two judges dissenting,[9] upheld the subpoenas as issued, with two exceptions (concerning raw field data and the suspected locations of natural gas in currently unleased acreage), the exceptions having been previously proposed by the FTC for settlement purposes. Also, notwithstanding that the issue was not before it, the *en banc* Court reduced by half the time provided by the District Court for compliance.

REASONS FOR GRANTING WRIT

1. Contrary to This Court's Decisions, the Circuit Court Has Removed Any Authority in the Courts To Modify Administrative Subpoenas for Burden or Relevance or To Protect Confidentiality.

The standard of review of administrative subpoenas applied by the Circuit Court effectively removes any authority in the courts to modify administrative subpoenas and reduces the courts to rubber stamps of administrative action. Although administrative agencies have broad powers to issue subpoenas, *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), those powers are not unlimited:

> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome. *See* v. *Seattle*, 387 U.S. 541, 544 (1967).

[9] The majority opinion of Judge Bazelon was joined by Judges Wright, Leventhal and Robinson. Judge Wilkey dissented joined by Judge MacKinnon. Judges McGowan, Tamm and Robb recused themselves.

It is the duty of the district court to which enforcement of administrative subpoenas is entrusted to examine those subpoenas and to keep them from being oppressive dragnets. *See, e.g., See* v. *Seattle, supra* at 544 (1967); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208-09 (1946); *Chapman* v. *Maren Elwood College*, 225 F.2d 230, 234 (9th Cir. 1954). That is precisely what the District Court did in this case. After receiving extensive submissions from all parties and holding two days of hearings in which the FTC stated the actual scope of its investigation, the District Court enforced the subpoenas modified to delete irrelevant and oppressive portions.

The four judges of the *en banc* majority, on the other hand, failed to make any factual investigation of relevance or burden, although they substituted their judgment on those issues for the District Court's. The only modifications which the Circuit Court adopted are those the agency itself proposed in settlement negotiations. App. at A44. With respect to burden, as discussed below, the majority simply asserted that the courts may not even take into account duplicative and overlapping investigations of sister agencies.

The extent to which the majority rubber stamped the FTC is illustrated by its response to the FTC's request for modification of the Court's opinion. On the FTC's motion, the majority modified its opinion to provide that the confidentiality provisions in this case have no precedential value. See App. at A165-66. The majority's complete deference to the FTC denies effective judicial review and thus precludes the protections which this Court has always held available to persons subject to subpoenas.

2. The Decision Below Alters the Established Standard of Review of District Court Decisions Respecting Administrative Subpoenas by Allowing the Reviewing Court to Reverse the District Court on Fact Issues Without Any Finding of Abuse of Discretion or Clear Error.

The *en banc* majority's decision sharply alters the historic roles of the trial court and the reviewing court in the enforcement of administrative subpoenas. If left standing, the decision would permit a circuit court simply to substitute its view for that of the trial court whenever questions of relevance or oppressiveness are raised.[10]

Determinations of relevance and burden are, of course, matters committed to the discretion of the district court and are not to be overturned without a finding of abuse of discretion or clear error. *See, e.g., United States* v. *Nixon,* 418 U.S. 683, 702 (1974); *FTC* v. *Lonning,* 539 F.2d 202, 211 (D.C. Cir. 1976). Except as to the District Court's limitation of the subpoenas to the years 1969-71, no reviewing judge has made any such finding in this case.[11] Rather, the majority avoided the established rule by finding that the District Court too narrowly conceived the scope of the FTC's investigation, a finding which the majority mischaracterized as a question of law. *See* App. at A22, A25 n. 29. Having placed the District Court's findings of relevancy and burden in that context, the

[10] This Court recently has in other cases had to exercise its supervisory powers over this circuit because the Circuit Court improperly substituted its judgment on review. *NLRB* v. *Pipefitters,* 45 U.S.L.W. 4144, 4150 (Feb. 22, 1977); *FPC* v. *Transcontinental Gas Pipeline Corp.,* 423 U.S. 326, 331 (1976).

[11] The sufficiency of the District Court's findings is discussed at length in the dissenting opinion. App. at A93-134.

majority then simply substituted its own view of the facts for that of the District Court as to the proper scope of the subpoenas.

The majority violated the elementary principle that the scope of an agency investigation and determinations of relevance of process pursuant to it are inherently tied together; the question of relevance cannot be separated from the district court's factual investigation of the agency's intended scope of investigation. *See Montship Lines Ltd.* v. *Federal Maritime Bd.,* 295 F.2d 147, 155 (D.C. Cir. 1961); *Hellenic Lines, Ltd.* v. *Federal Maritime Bd.,* 295 F.2d 138, 140 (D.C. Cir. 1961); *FTC* v. *Green,* 252 F. Supp. 153 (S.D.N.Y. 1966). To assess relevance it is essential to know the purpose of the investigation. *Id.* Absent such comparison, the concept of relevance would be meaningless.

The FTC resolution establishing an investigation and authorizing the subpoenas in question is extremely vague and overbroad and would on its face have permitted the FTC to require the production of virtually every document in Petitioners' possession.[12] It is in just this type of case that the role of the district court in determining the permissible scope of administrative subpoenas is vital. District courts have enforced subpoenas pursuant to very broad agency resolutions, but only where the courts found a narrower focus of investigation which justified enforcement of the issued subpoenas. *See, e.g., FTC* v. *Green, supra,* where the court upheld an administrative subpoena issued to a broad resolution only after finding:

> [I]t is evident from the nature of the data here sought that the Commission is investigating

[12] *See* App. at A287.

> whether Standard Brands or other manufacturers are selling below cost or otherwise engaging in price discrimination not justified by costs. *Id.* at 156.

Before making its findings of relevance the District Court carefully inquired of FTC counsel regarding the actual scope of the FTC's investigation. FTC counsel responded as follows:

> [FTC COUNSEL]: . . . [W]hat we are investigating is possible collusive conduct by the natural gas producers in the reporting of these reserves.
>
> . . . .
>
> [FTC COUNSEL]: . . . What we want to find out is whether or not in reporting natural gas reserves there has been collusive conduct in the way these estimates are prepared.
>
> THE COURT: Reporting them to whom.
>
> [FTC COUNSEL]: All right. Reporting them to the American Gas Association, because the American Gas Association data is the only available published data on these reserves. App. at A95-96.

These statements are binding on the FTC, *see United States* v. *Star Construction Co.*, 186 F.2d 666, 669 (10th Cir. 1951), but even if they were not binding, FTC counsel's representations are unquestionably a proper element for consideration in the District Court's fact finding. Partly on the basis of these representations, the District Court enforced the subpoenas with limitations. Without the limiting explanations of counsel, the Court might well have had to refuse enforcement altogether. *See Montship Lines Ltd.* v. *Federal Maritime Bd.*, 295 F.2d 147, 155 (D.C.

Cir. 1961); *FTC* v. *Green*, 252 F. Supp. 153 (S.D.N.Y. 1966).

The Circuit Court decision subverts the historic allocation of responsibility between trial and appellate courts. If investigative subpoenas are to be promptly enforced and agency investigations are to go forward expeditiously, it is essential that trial courts be permitted to resolve inherently factual disputes. To allow appellate courts to substitute their judgment on the issues of relevancy and burden would greatly erode the district courts' authority, contribute to delay and frustrate enforcement, as the instant case illustrates. The District Court's order herein was issued more than three years ago. Instead of proceeding under that order, obtaining most of what was originally sought, and returning for additional discovery as the District Court expressly permitted,[13] the FTC stayed its investigation while seeking time-consuming appellate review. The majority's apparent endorsement of the FTC's dilatory approach invites needless appeals and requires extensive and duplicative appellate inquiry into factual matters determined below. Reaffirmation by this Court of the proper scope of review in this case would discourage such delays and needless burdens on already clogged appellate courts.

The error in the majority's whole approach is well summarized in the words of the dissent:

> The majority has engaged in a standardless, directionless review in this case, and no euphemism can disguise this embarrassing fact. The majority opinion demonstrates this assertion by failing to even define the purpose of the FTC in-

[13] *See* App. at A61.

vestigation which is being subjected to de novo review, although the trial court had elucidated this quite well from FTC counsel. . . . The failure to focus on the FTC's purpose in turn causes the majority to roam into those areas committed by precedent to, and more appropriate for, the district court. . . .

The enlarged role which the majority has assigned to this court in this case distorts the proper relationship between the federal agencies, the federal trial courts, and the federal appellate courts. In so doing, the majority sets a pernicious precedent for future trials *de novo* which would leave the Court of Appeals as the primary determinant of factual matters more properly suited for the District Court.

The strength of this sloppy precedent is, of course, weakened by the composition of the *en banc* court in this case; here the majority consists of only four of our colleagues. It is our hope that the approach adopted by this diminished majority of the court will not be carried over into future cases. If it is attempted to be so applied in the future, it will be a divergence from accepted practice of such magnitude that a close examination by our full court will be warranted, if the errors of our four colleagues have not already received their just reward from an even higher authority. App. at A163-64.

3. The Circuit Court Decision Eliminates Any Authority in the District Court To Limit the Burden of Administrative Subpoenas Resulting From Duplicative Investigations by Sister Federal Agencies.

The *en banc* majority not only rejected any preclusive effect of the FPC fact determination, but even prohibited the District Court from taking into account the FPC's findings in determining whether the FTC

subpoenas were oppressive. The effect of that decision is to deprive the district courts of all authority to coordinate or limit administrative subpoenas where jurisdictional or investigative overlaps occur.

The proliferation of repetitive demands is clearly a proper factor to be considered in assessing the burden of administrative subpoenas. *See Application of Consumer's Union of United States, Inc.,* 27 F.R.D. 251, 254 (S.D.N.Y. 1961). Yet the majority's position appears to be that the repetitive and cumulative nature of subpoenas should be ignored when it is the result of demands of multiple Government agencies. *See* App. at A38-40.

Judicial discretion to avoid the whipsaw effect of repetitive demands of multiple Federal agencies is particularly needed where Federal agencies conduct overlapping investigations. Obviously, agencies have different statutory responsibilities and must be allowed to carry out the duties which Congress assigned them. That point was carefully observed by the District Court, which specifically found "that the Trade Commission is authorized to pursue the investigation to determine whether there exists any evidence of conspiracy . . ." App. at A57. At the same time, no Federal agency is a sovereign unto itself. Each is part of the United States Government; where one has authority to bind the United States, all will be bound. *See S & E Contractors, Inc.* v. *United States,* 406 U.S. 1, 10 (1972); *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 402-03 (1940). This principle requires that district courts have discretion to determine whether repetitive agency demands are needlessly burdensome.

District court discretion is particularly vital where, as here, sister agencies of the Government become involved in "competitive" activity. If the Circuit Court's decision stands, district courts will be powerless to ameliorate the effects of identical demands of a "competing" agency. Without judicial control this quickly leads to a situation in which no response to an agency is ever sufficient because of the appetite of "competing" agencies to reexamine the matter to show the inadequacy of the other agency's efforts.

To avoid that unseemly and prejudicial effect, this Court should affirm the view of the Circuit Court's dissenters which would

> leave it to the sound discretion of the district courts to determine whether the effort and expense involved in responding to repetitive agency demands imposes an unfair and unreasonable burden on the responding parties. Being another essential factual determination, this has always been, and should remain, the province of the district courts. App. at A130.

4. The Decision of the Court Below to the Extent It Determines the Issue of Collateral Estoppel Resolves an Important Point of Law in Conflict with Decisions of This Court and Other Circuits.

Petitioner has urged in these proceedings that collateral estoppel is not an issue which needs to be addressed in this case, and that the decision of the District Court is fully sustainable as an exercise of its discretion. Nevertheless, the *en banc* Court asked counsel for argument on the question of collateral estoppel. The majority found that collateral estoppel could not be raised at this stage, thus denying petitioners the beneficial

effects which collateral estoppel is supposed to have. App. at A34-36. Judge Leventhal, concurring, went even further, stating that "the whole doctrine of preclusive effect whether cast as collateral estoppel or res judicata is inapplicable to the conclusion of an agency exercising such a legislative function as ratemaking." App. at A-65. The dissenting judges took the contrary position and relied on collateral estoppel as an alternative independent ground for sustaining the District Court decision. App. at A134-58.

Having addressed the issue and having declined to give preclusive effect to the relevant FPC fact determinations, the Circuit Court determined an important question of law in conflict with decisions of this Court and other Circuits. *See United States* v. *Utah Construction Co.*, 384 US. 394, 421-22 (1966); *Safir* v. *Gibson*, 432, F.2d 137 (2d Cir. 1970) (Friendly, J.), *cert. denied*, 400 U.S. 942 (1970); *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944); *George H. Lee Co.* v. *FTC*, 113 F.2d 583 (8th Cir. 1940). The defects of that position and its adverse consequences are well set out in the dissenting opinion of the Circuit Court. App. at A134-58. *See also* the accompanying Petition of Exxon Corp., et al., for Certiorari.

CONCLUSION

For the reasons stated in the dissent of Judges Wilkey and MacKinnon, and herein, a writ of certiorari should issue in this case.

Respectfully submitted,

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April 15, 1977

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Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondents.

PETITIONERS' JOINT APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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v.

MOBIL OIL CORPORATION, A CORPORATION

(Civil 1096-73)

Appeals from the United States District Court
for the District of Columbia

Argued En banc April 19, 1976

Decided February 23, 1977

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Counsel, Federal Trade Commission and *Leonard Schaitman*, Attorney, Department of Justice were on the brief for appellant. *Robert E. Duncan*, *William Cerillo*, Attorneys, Federal Trade Commission and *John K. Villa*, Attorney, Department of Justice, also entered appearances for appellant.

William Simon, with whom *Roger C. Simmons* and *Robert L. Norris*, were on the brief for appellee in No. 74-1550 also argued for appellees in Nos. 74-1547, 74-1548 and 74-1551. *Robert F. McGinnis*, was on the brief for appellee in No. 74-1547. *John W. Howard*, was on the brief for appellee in No. 74-1548. *J. Wallace Adair*, *Terrence C. Sheehy* and *Thomas G. Johnson* were on the brief for appellee in No. 74-1551. *W. C. Weitzel, Jr.*, also entered an appearance for appellee in No. 74-1547. *Terrence C. Sheehy* also entered an appearance for appellee in 74-1550.

Lee Loevinger, with whom *Raymond E. Vickery, Jr.*, was on the brief for appellee in No. 74-1553. *Martin Michaelson*, also entered an appearance for appellee in 74-1553.

Michael J. Henke, with whom *Harry M. Reasoner* was on the brief for appellee in No. 74-1554.

Daniel A. Reznick with whom *Abe Krash* was on the brief for appellee in 74-1549.

Before: BAZELON, *Chief Judge*, WRIGHT, LEVENTHAL, ROBINSON, MACKINNON, and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Chief Judge* BAZELON.

Concurring Opinion filed by *Circuit Judge* LEVENTHAL.

Dissenting Opinion filed by *Circuit Judge* WILKEY, with whom *Circuit Judge* MACKINNON joins.

BAZELON, *Chief Judge*: These consolidated cases are before the court en banc on appeals by the Federal Trade Commission (FTC) from orders of the district court granting enforcement in part and denying enforcement in part with respect to administrative subpoenas *duces tecum* issued by the FTC to appellees, seven natural gas producers.[1] The subpoenas in question were authorized by the FTC in aid of a formal investigation into the procedures employed by various natural gas producers in reporting their gas reserves—an investigation stemming primarily from an unprecedented decline in these reported reserves. That this nation currently is in the midst of a energy crisis, however defined, need not be detailed by this court. The extent of the energy shortage, the reasons for it, and the appropriate governmental and industry responses to the problem are the focus of debate and investigation in various executive agencies and in Congress. Such questions are largely outside the province of the judiciary. In these cases we consider only the propriety of these investigative subpoenas in the context of the limited role assigned to the federal courts in enforcement proceedings.

I. FACTUAL BACKGROUND

A. *The FTC Investigation*

The American Gas Association (AGA), a trade association composed of producers, distributors, and marketers of natural gas, is recognized as one of the principal sources of authoritative statistical data concerning the natural gas industry. In 1945 the AGA established a Committee on Natural Gas Reserves to formulate an-

[1] The FTC subpoena and the district court orders are reproduced in the appendix to this opinion.

nual estimates of proved reserves[2] for the benefit of the gas industry, the Government, and the general public. To facilitate this task, the Committee has subdivided the United States into ten regions and has assigned a sub-

[2] The term "proved reserves" is central to the discussion herein. The following definition has been adopted by the AGA:

> Proved Reserves are the estimated quantity of natural gas which analysis of geologic and engineering data demonstrate with reasonable certainty to be recoverable in the future from known oil and gas reservoirs under existing economic and operating conditions. Reservoirs are considered proved that have demonstrated the ability to produce by either actual production or conclusive formation test.
>
> The area of a reservoir considered proved is that portion delineated by drilling and defined by gas-oil, gas-water contacts or limited by the structural deformation or lenticularity of the reservoir. In the absence of fluid contacts, the lowest known structural occurrency of hydrocarbons controls the proved limits of the reservoir. The proved area of a reservoir may also include the adjoining portions not delineated by drilling but which can be evaluated as economically productive on the basis of geological and engineering data available at the time the estimate is made. Therefore, the reserves reported should include total proved reserves which may be in either the drilled or the undrilled portions of the field or reservoir.
>
> Natural gas reserves take into account the shrinkage of the reservoir gas volume resulting from the removal of the liquefiable portions of the hydrocarbon gases and the reduction of volume due to the exclusion of non-hydrocarbon gases where they occur in sufficient quantity to render the gas unmarketable.
>
> The proved reserves estimated are to include all gas reserves regardless of size, availability of market, ultimate disposition or use.

See "Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity," Volume 28, June 1974. The

committee of its members to compile the gas reserve estimates for each area. Members of the subcommittees usually are employees of the gas producers, and each subcommittee member generally is assigned fields in which his employer is the major producer or has some other ownership interest.[3]

In May of 1969 the AGA for the first time reported a decline in the nation's proved reserves, occurring in 1968. The reported decrease came on the heels of a Federal Power Commission (FPC) order instituting a proceeding to reconsider rates for the offshore portion of Southern Louisiana in light of the supply of gas reserves for that area.[4] The AGA report for 1969, issued

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first two paragraphs of this definition appear on page 103 of this publication, the third paragraph is derived from page 99, and the last paragraph is derived from pages 96 and 97.

Essentially the concept of proved reserves is bottomed on the presence of enough technical data to ensure reasonably accurate measurement of a known reservoir. Even proved reserves are only estimates, however, and competent evaluators may produce slightly different figures based on different analyses of the geological data. *See, e.g.*, Federal Power Commission *Staff Report on the Updated 31 Lease Investigation*, June 1976, at 16; Federal Power Commission *Analysis of "Gas Reserve Estimation of Offshore Producible Shut-in Leases in the Gulf of Mexico,"* May 1976, at 1-3. Gas producers may also denominate reserves as "speculative," "possible," "probable," "recoverable," or "ultimately recoverable"—indicating the progression of knowledge as a field is developed—but there is no accepted use or definition of these terms by the industry. Only proved reserves are consistently defined, and only proved reserves are reported by the AGA.

[3] App. III 537a-543a, 556a-558a.

[4] 41 F.P.C. 378 (Mar. 20, 1969). The FPC order mandated an investigation of "offshore gas supply and costs associated therewith." *Id.* at 379; *see* further discussion *infra* at 12. In May of 1968 the Supreme Court had approved the FPC's

in May of 1970, revealed further declines in total reserves for the United States and, this time, in Southern Louisiana reserves as well. The Southern Louisiana area is generally acknowledged to be the most important gas-producing area in the nation, accounting for approximately one-third of our domestic natural gas production.[5]

By letter of September 1, 1970 to Commissioner McIntyre of the FTC, Senator Philip A. Hart, chairman of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, stated that there were numerous allegations that natural gas producers were withholding information on gas reserves in order to obtain higher rates from the FPC and recommended that the Commission conduct an investigation to determine whether any activities in violation of section 5 of the Federal Trade Commission Act had occurred.[6] On October 13, the Secretary of the Commission replied that "in order that the possibility of collusion or other unlawful conduct in this field may be more fully explored, we have today directed our staff to commence an investigation which will focus principally on the reporting, estima-

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functional use of price "as a tool to encourage the production of appropriate supplies of natural gas." Permian Basin Area Rate Cases, 390 U.S. 747, 796-98.

[5] Mobil Oil Corp. v. FPC, 417 U.S. 283, 292-93 (1974), *citing* Southern Louisiana Rate Cases, 428 F.2d 407, 418 (5th Cir. 1970). The area is defined by the FPC to include all parts of the state south of the thirty-first parallel, together with the offshore territory in the federal domain that would be bounded by Louisiana borders if extended into the Gulf of Mexico. *Id.*

[6] Section 5(a)(1) of the FTC Act, as amended, provides that "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1).

tion, and deployment of reserves by the Natural Gas Industry in one selected area of the country." [7]

After informal investigative efforts proved inadequate, the Bureau of Competition determined that the issuance of subpoenas would be necessary and so advised the Commission. On June 3, 1971, the FTC issued a resolution directing the use of compulsory process in furtherance of a nonpublic investigation. The nature and scope of the investigation were stated as follows:

> The purpose of the authorized investigation is to develop facts relating to the acts and practices of . . . [certain named corporations] to determine whether said corporations, and other persons and corporations, individually or in concert, are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act.[8]

During this period of the investigation the AGA cooperated with the FTC on a voluntary basis. Field-by-field estimates of each Southern Louisiana subcommittee member for the years 1966 through 1970 were made

[7] App. IX 1686a. Section 6(a) of the FTC Act, as amended, empowers the Commission

> To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships and corporations. 15 U.S.C. § 46(a).

[8] App. III 497a.

available for the Commission's inspection and analysis in October 1971. The FTC staff also obtained data from reports filed with the FPC pertaining to gas reserves in Southern Louisiana. These reports, known as Form 15 reports, are filed by interstate natural gas pipelines and list recoverable, saleable gas reserves committed to, collected by, or held by the reporting pipeline company. With information gained from these sources, as well as from numerous interviews and depositions, the FTC drafted a comprehensive subpoena *duces tecum* which was issued on November 24, 1971 to eleven natural gas producers.[9]

The FTC subpoena is premised on a thorough investigation of the producers' estimation of gas reserves for the Southern Louisiana area, with a view towards comparison of the various estimates used by producers in their internal procedures and business operations with those reported as proved estimates to the AGA. To summarize briefly, Specifications A through F of the sub-

[9] Section 9 of the FTC Act, as amended, provides in pertinent part:

> For the purposes of the [FTC Act] the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. 15 U.S.C. § 49.

poena demand background information such as the company's annual reports, subsidiaries, officers, customers, net production, and sales volume. Specification G requests documents and underlying data relating to all reserve estimates for the Southern Louisiana area made by the producers, both for internal purposes and for reports to the AGA, during the period 1962-1970. Specification H requires technical data concerning the location, operations, ownership interests, and drilling status of the fields and leaseholds for which estimates are provided pursuant to Specification G. Specification I seeks documents commenting on or otherwise relating to the preparation of various reserve estimates, the procedures employed therein, and the personnel involved. Specification I also requires, *inter alia*, documents relating to "lease nominations and bids, any agreements for joint or common leasing, exploration, development, production, purchase or sale, or any cash flow or economic feasibility studies preparatory to leasing, exploring, developing, purchasing or selling, which involve Offshore South Louisiana acreage." Specification J requires various documents pertaining to reports of proved reserves to the AGA. Specification K asks for documents referring to any relation between the reporting of proved reserves and the rates for natural gas permitted by the FPC. Finally, Specification L demands the names of all employees involved in the estimating and evaluating process, together with their areas of responsibility.

All eleven gas producers filed motions to quash the subpoenas. On June 27, 1972, the Commission denied the motions. During subsequent negotiations between the Commission's staff and the gas producers, the Commission offered additional confidentiality protection for the information to be provided under Specifications G, H, and I;[10] as a result, two producers agreed to comply in

[10] App. IV 625a, 643a.

full with the subpoenas and one producer agreed to comply in part. The remaining producers refused to comply. Accordingly, petitions for enforcement were filed in the district court on June 4, 1973.[11] Shortly thereafter, one other firm agreed to comply.

B. *The FPC Proceeding*

Roughly concurrently with the FTC's investigation, the Federal Power Commission was conducting a ratemaking proceeding for the Southern Louisiana area. Since this proceeding figures prominently in the arguments of the gas producers, it will be discussed at this point. The FPC began considering area rates for Southern Louisiana in the early 1960's, (*So La I*), but a final decision was not rendered until 1968.[12] Almost immediately, and while *So La I* was still under review by the Fifth Circuit, the FPC instituted a new proceeding (*So La II*) to reconsider rates for the offshore portion of Southern

[11] Section 9 of the FTC Act, as amended, provides in relevant part that

> . . . in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. 15 U.S.C. § 49.

[12] Area Rate Proceeding (Southern Louisiana), 40 F.P.C. 530 (Sept. 25, 1968), *modified on rehearing*, 41 F.P.C. 301 (Mar. 20, 1969), *aff'd*, Southern Louisiana Area Rate Cases, 428 F.2d 407 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970).

Louisiana;[13] a few months later, the Commission expanded the proceeding to include the entire area.[14]

The FPC was responding to numerous complaints that the supply-demand situation had changed significantly since the record in *So La I* was closed. The gas producers argued that present supplies were diminishing and that the rates established in *So La I* were inadequate to stimulate the development of new supplies. Various municipal distributors charged, however, that the producers were understating their reserves in reports to the AGA and were deliberately withholding natural gas. In December 1969 the FPC established procedures for the *So La II* proceeding and directed that a full evidentiary record be made on the reserve data question.[15] As part of a staff investigation into the accuracy of the AGA data, the FPC ordered producers to furnish data relating to "uncommitted" natural gas reserves in the Southern Louisiana area;[16] these estimates were confirmed by a staff-supervised spot audit. From an analysis of the pertinent Form 15 reports, the results of the uncom-

[13] 41 F.P.C. 378 (Mar. 20, 1969).

[14] 42 F.P.C. 1110 (Dec. 15, 1969).

[15] The FPC stated that evidence should be taken "with respect to the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the cause of a gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence. . . ." 42 F.P.C. 1110, 1112 (Dec. 15, 1969).

[16] 43 F.P.C. 444, 445 (Mar. 17, 1970). The FPC already had data pertaining to gas reserves from Form 15 reports filed by pipelines. Form 15 applies only to reserves "committed" or "dedicated" to interstate sale; thus, "uncommitted" reserves are unreported. The uncommitted reserves study was intended to supplement existing data in an effort to determine if the trends reflected in Form 15 reports were an accurate cross-check of AGA reported reserves. *See* 46 F.P.C. 86, 113-114 (July 16, 1976).

mitted reserves study, and testimony from AGA officials, the FPC staff concluded that the AGA data was reliable. Following extensive evidentiary hearings before an administrative law judge, the record was certified to the entire Commission.

The FPC issued its decision in *So La II* on July 16, 1971 (shortly after the FTC resolution authorizing compulsory process in its investigation). The Commission discussed in some detail both the staff's investigation and the contentions of several intervenors that producers had underreported their reserves.[17] The Commission concluded that the AGA reserve data was "reasonably reliable for the [ratemaking] purposes used herein."[18]

C. *Subsequent Litigation*

Pursuant to the FTC's petitions for enforcement of the subpoenas against the seven companies still refusing to comply, the district court held hearings on July 30 and December 13, 1973, and considered extensive briefs and other evidentiary materials filed by the parties. The two orders at issue here were filed on March 22, 1974. One order deals with the subpoenas issued to appellees Texaco, Inc., Standard Oil Co. (Indiana), Standard Oil Co. of California, Mobil Oil Corp., Shell Oil Co., and

[17] Order and Opinion Determining Just and Reasonable Rates for Natural Gas Produced in the Southern Louisiana Area, 46 F.P.C. 86, 110-116 (July 16, 1971).

[18] *Id.* at 116. The Commission's order was affirmed by the Fifth Circuit, *Placid Oil v. FPC*, 483 F.2d 880 (5th Cir. 1973), and the court of appeals subsequently was affirmed by the Supreme Court, *Mobil Oil v. FPC*, 417 U.S. 283 (1974).

At the direction of Congress, the FPC began in 1971 a National Gas Reserves Study. The independent survey was conducted on a random sampling basis and produced estimates of gas reserves as of December 31, 1970. A staff report, published in May 1973, noted that the AGA total estimate was slightly higher than the NGRS total estimate. App. VI 1048a.

Exxon Corp.; the other order pertains to the subpoena issued to Superior Oil Co., Inc. The orders granted in part and denied in part the FTC's petitions.

The exact basis for each modification made by the district judge is unclear. In the introductory paragraph of the first order, the court noted that the gas producers had contended "that the principles of primary jurisdiction and collateral estoppel preclude the Trade Commission from seeking the demanded documents or data for purposes of determining the validity or accuracy of natural gas reserve estimates, and . . . that certain demands of the subpoenas are irrelevant to any proper subject or area of investigation and are unduly broad and burdensome. . . ." Without specifically ruling on these arguments in relation to each demand in the subpoenas, the court stated that:

> . . . being of the opinion that the Trade Commission is authorized to pursue the investigation to determine whether there exists any evidence of conspiracy in the reporting of proved natural gas reserve estimates to the American Gas Association by respondents, but that the subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission, and the Court being of the further opinion that the subpoenas are improper in other respects as well and should not be enforced as issued. . . ."

In the first order the district court granted enforcement of Specifications A through F, dealing with background data; these specifications were not really contested by the parties. For Specifications G, H, and I, production of documents was limited to the years 1969, 1970, and 1971 and to a random sample of 100 out of

approximately 225 offshore Southern Louisiana fields. Most importantly, production was limited to documents containing or underlying *proved* natural gas reserve estimates; "raw field data, bid calculation data, and bid calculation files" were specifically excluded. The court stated that all production pursuant to these three specifications "shall be made for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves." In Specifications J and K production was limited to documents relating to proved reserves in only those offshore fields which were included in reports for 1971 by the AGA subcommittee for Southern Louisiana, and to documents from 1966 through 1971 "which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondent or others, including the American Gas Association"; production of intra-corporate documents was foreclosed. Specification L was limited to those employees who "acted with respect to proved natural gas estimates" for offshore Southern Louisiana during the period 1966 through 1971. For all specifications, the court granted the producer the option of producing the documents at the corporate office or field location where they were normally maintained, rather than at the FTC's offices in Washington, D.C.; further, for documents furnished at a producer's offices, the FTC was to bear any costs of reproducing the documents. Finally, the court provided further protection for any documents designated by the producer as confidential, ruling that, unless otherwise ordered by the court, such documents were to be held in the custody of the Commission's Secretary, used only in the current investigation, inspected only by Commission employees assigned to the investigation, and re-

turned to the producer at the completion of the investigation.

In the second order, relating to Superior, the district court enforced only Specifications A through F and K through L of the subpoena; Specifications G through J, requiring, *inter alia*, the production of reserve estimates, were quashed in their entirety. The same confidentiality protection accorded the other six producers also was granted to Superior. While no rationale was stated in the order, the different treatment for Superior apparently reflects an acceptance of Superior's argument that because it had never been a member of the AGA and had not furnished reserve estimates to the AGA, it could not be involved in any conspiracy to underreport reserves.

On appeal, a panel of this Court affirmed the district judge's orders, upholding all modifications of the subpoena except the limitation to data from 1969-1971 in Specifications G, H, and I—the FTC's demand for documents from 1962-1971 was reinstated. The FTC petitioned for rehearing or rehearing en banc; on February 6, 1976 this court vacated the panel opinion and ordered the cases reheard en banc.

II. Court Enforcement of Administrative Subpoenas —The Applicable Legal Principles

The Supreme Court has made it clear that the court's role in a proceeding to enforce an administrative subpoena is a strictly limited one. The seminal case is *Endicott Johnson v. Perkins*, 317 U.S. 501 (1943). The *Endicott* Court held that, on application for enforcement of a subpoena issued by the Secretary of Labor in administrative proceedings against the petitioner under the Walsh-Healy Public Contracts Act, the district court lacked authority to determine whether the corporation's activities were covered by the statute. Rather, the Court stated, since the evidence sought by the subpoena was

not "plainly incompetent or irrelevant to any lawful purpose" of the Secretary, it was the district court's duty to order its production for the Secretary's consideration. *Id.* at 509. Shortly thereafter, in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the Court applied the same principles to the enforcement of subpoenas issued pursuant to an investigation under the Fair Labor Standards Act.[19] Rejecting any power in the district court to adjudicate coverage, the Court ruled that so long as the investigation was for a lawfully authorized purpose, the documents sought were relevant to the inquiry, and the demand was reasonable, the Administrator had a right to judicial enforcement of the subpoenas. *See id.* at 209. Emphasizing the importance of the administrative mandate to search out violations with a view to securing enforcement of the Act, the Court stated that while the Administrator may not act arbitrarily or in excess of his statutory authority, "this does not mean that his inquiry must be 'limited . . . by forecasts of the probable result of the investigation'. . . ." *Id.* at 216, *quoting Blair v. United States*, 250 U.S. 273, 282 (1919).

In a case dealing directly with the investigative powers of the Federal Trade Commission, *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Court once again enunciated the standard: ". . . it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id.* at 652. In upholding the Commission's order requiring certain corporations to file special reports demonstrating continuing compliance with a cease and desist order, the Court distinguished the

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[19] Notably, the Fair Labor Standards Act incorporated sections 9 and 10 of the Federal Trade Commission Act for the purpose of any hearing or investigation. *See* 327 U.S. at 200, n.24.

judicial process, which does not involve itself in so-called "fishing expeditions" to determine if violations of law have occurred, from the administrative function of investigation:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law. *Id.* at 642-43.

Thus, while the court's function is "neither minor nor ministerial," *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 217 n. 57, the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity. As the Ninth Circuit has noted, the "very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate. . . ." *FMC v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975).[20]

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[20] The principles set down by the Supreme Court have been uniformly followed by the circuit courts of appeals. *See, e.g.*, United States v. Litton Industries, 462 F.2d 14, 16 (9th Cir. 1972); Genuine Parts v. FTC, 445 F.2d 1382, 1391 (5th Cir. 1971); FTC v. Browning, 435 F.2d 96, 102 (D.C. Cir. 1970); SEC v. Wall Street Transcript Co., 422 F.2d 1371, 1375 (2d Cir.); *cert. denied*, 398 U.S. 958 (1970); Adams v. FTC, 296 F.2d 861, 866 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962).

III. The Issues

With these standards in mind, we turn to the issues at hand. The FTC's allegations of error in the district court's modifications of the subpoenas, and the producers' arguments in response, focus on four general areas: 1) limitations apparently grounded on relevance, 2) application of some form of collateral estoppel to preclude certain aspects of the FTC's investigation, 3) limitations premised on burdensomeness, and 4) conditions on use and possible disclosure of the documents.[21]

A. *Relevance Determinations*

1. *Limitation to Documents Relating to Proved Reserve Estimates*

The gas producers contend that the district court properly limited production to those documents relating to

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[21] On the initial appeal to this court, Standard Oil of California maintained that the district court's first order is not a final decision under 28 U.S.C. § 1291 and therefore is not appealable. This argument was rejected in the panel decision, and Standard Oil has not pressed it on rehearing en banc. We nonetheless note that it is settled that an order of a district court granting or denying an agency's petition for enforcement of a subpoena is final and appealable. Ellis v. ICC, 237 U.S. 434, 442 (1915); Int'l Brotherhood of Electrical Workers v. EEOC, 398 F.2d 248, 251 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969). The district court's retention of jurisdiction for possible further relief *after* the documents were produced does not defeat finality. *See* FTC v. Feldman, 532 F.2d 1092, 1098 (1976).

proved reserves on grounds of relevance.[22] They argue that because the FTC's investigation is targeted on a conspiracy to underreport reserves to the AGA, and only proved reserves are reported to the AGA, only proved reserves can be relevant to the inquiry. The FTC, on the other hand, maintains that its investigation cannot be so circumscribed, and that all reserve estimates made by the producers, both for various internal business purposes and for reports to the AGA, and however denominated, are relevant to assess whether violations of section 5 of the Federal Trade Commission Act have taken place.

In resolving this controversy, we must determine whether the district judge's limitation comports with the standard of "reasonable relevance." [23] Where, as

[22] As previously discussed, the district judge did not concretely state the reasons for the limitation to proved reserves in his order. During the hearings, however, the district judge appeared to accept the producers' arguments that only proved reserves are relevant. App. II 398a-402a, 431a, 439a-443a. The limitation to proved reserves was also premised in part on an application of collateral estoppel. *See* discussion *infra* at 38.

[23] This standard was urged by the FTC in its first brief on appeal. FTC's Brief at 16. In its supplementary brief the FTC argues that the pertinent inquiry is whether the requested material is "plainly irrelevant" to the investigation. Supp. Brief at 5, 31.

The "plainly irrelevant" language is derived, of course, from the Supreme Court's statement in *Endicott Johnson* that the evidence sought by the subpoena was not "plainly incompetent or irrelevant" to any lawful purpose of the Secretary. 317 U.S. at 509. The issue before the *Endicott* Court was the authority of the district court to decide the question of statutory coverage; the appropriate standard of relevance was not directly addressed. In *Oklahoma Press* and *Morton Salt*, decided after *Endicott*, the Court spoke of information "relevant" and "reasonably relevant," respectively, to the inquiry. 327 U.S. at 209; 338 U.S. at 652. More re-

here, no complaint has yet been formulated and the issues have therefore not yet been crystallized, some courts have concluded that an attenuated standard of relevance is appropriate.[24] In our view, however, the better approach is simly to recognize that in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case. Accordingly, the relevance of the agency's subpoena requests may be measured only against the

cently, the Court has stated that, for enforcement of an Internal Revenue Service summons for records, the Commissioner must demonstrate, *inter alia*, that the inquiry "may be relevant" to a legitimate purpose. United States v. Powell, 379 U.S. 48, 57 (1964). And in See v. City of Seattle, 387 U.S. 541 (1967), the Court noted, citing *Morton Salt* and *Oklahoma Press*, that when an administrative agency subpoenas corporate books or records, the subpoena must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Id.* at 544.

While some courts of appeal have employed a "clearly" irrelevant standard in enforcement proceedings, *see, e.g.*, FTC v. Feldman, 532 F.2d 1092, 1098 (1976); FTC v. Standard American, Inc., 306 F.2d 231, 235 (3d Cir. 1962), most have utilized the "reasonably relevant" language of *Morton Salt*. *See* cases cited at 24, n. 20. In *Moore Business Forms v. FTC*, 307 F.2d 188 (D.C. Cir. 1962), a panel of this court stated it could not say that the subpoenaed information was "plainly irrelevant" to the charges in the complaint. *Id.* at 189. Another panel of this court, however, has recited the "reasonably relevant" language. FTC v. Browning, *supra* n. 20, 435 F.2d at 102.

Without deciding whether a "plainly irrelevant" standard actually is indicative of a more limited power of review, it suffices to dispose of this case that the material sought by the FTC is "reasonably relevant" to a permissible FTC purpose.

[24] *See, e.g.*, Westside Ford v. United States, 206 F.2d 627, 632 (9th Cir. 1953); FTC v. Green, 252 F. Supp. 153, 156 (S.D.N.Y. 1966).

general purposes of its investigation. The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue.[25]

Under this frame of reference, the district court's determination that only proved reserve estimates are relevant cannot withstand scrutiny. The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution.[26] Here, however, the gas producers have posited—and the district court has apparently accepted—an erroneous interpretation of the scope of the FTC's inquiry, and they have then sought to limit the investigation to the confines of this distorted interpretation. There is no merit to the producers'

[25] In *Oklahoma Press*, the Court emphasized that the purpose of the subpoena was "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." 327 U.S. at 201. And in *Morton Salt* the Court stated that "[e]ven if one were to regard the information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U.S. at 652.

[26] *Supra*, p. 8. While the language of the resolution is broad, resolutions of this sort are not uncommon in the investigative process, and the agency was not required to articulate its purpose with greater specificity. *See, e.g.*, FTC v. Feldman, *supra* n. 23, 532 F.2d at 1093; FTC v. Standard American, Inc., *supra* n. 23, 306 F.2d at 233-34; Westside Ford v. United States, *supra* n. 24, 206 F.2d at 630-31; FTC v. Green, *supra* n. 24, 252 F. Supp. at 154-56.

contention that the FTC is only investigating possible underreporting of proved reserves to the AGA. The FTC's resolution does not even mention either the AGA or proved reserves; further, in addition to "conduct in the reporting of natural gas reserves," the resolution obviously incorporates a broad range of activities "relating to the exploration and development, production, or marketing of natural gas . . . ." Although the FTC has never denied that reporting to the AGA is one aspect of its inquiry, it has repeatedly stated that its investigation cannot be so narrowly defined.[27]

Basically, the gas producers would have us believe that all the FTC has in mind is a *recomputation* of proved reserve estimates submitted to the AGA. On the contrary, the authorized inquiry envisions an examination of all phases of the estimating process. In particular, the FTC seeks to compare estimates prepared for various business purposes with those reported to the AGA. As Specification G of the subpoena indicates, producers may make reserve estimates in connection with bidding on or nominating leases; deciding whether or not to erect permanent platforms; compiling or inventorying total company reserves or supply; negotiating or contracting for the sale of natural gas, or for the joint or common exploration, development, production, purchase, or sale of acreage; obtaining bank loans; or filing depreciation expense schedules with the Internal Revenue Service. While some of these estimates may be labeled *proved*, some may not. Producers also may refer to certain reserve estimates as, *inter alia*, speculative, possible, or probable, depending on the stage of development of the field.

In order to asses whether proved reserve figures accurately reflect economic reality, reserve estimates with

[27] FTC Reply Brief at 304; FTC Supp. Brief at 32-34, TR. at 5-7.

other labels may be important; the same or substantially similar underlying data may give rise to distinctly denominated reserve estimates. In other words, the FTC may fairly inquire whether the companies, through the use of an excessively restrictive approach, have excluded awareness of certain realistic and reliable estimates which *are* taken into account in making significant business decisions but which are not labeled "proved" and are therefore not included in the AGA reports. As counsel for the FTC stated to the district judge, in explaining the relevance of the requested data,

> This is relevant in determining whether AGA reserves reflect economic realities. Remember, those reserves are based on a definition of what constitutes a proved reserve but it may be that an examination of the company's practices in the way it computes its reserves would show that the AGA reserve definitions are too restrictive, that in fact the companies themselves by their own conduct show that their reserves are more than what they would report to the AGA as proved reserves, or given a top and down estimate they may pick within a wide range, they may pick a top estimate for purposes where it serves their purposes, and a low estimate for other purposes where it serves their purpose.

App. II 368a-369a.

Thus, even if the FTC were investigating only the reporting of proved reserves (and we conclude that the inquiry is not so narrow), the analysis would certainly not be limited to whether the gas producers have accurately *calculated* their proved reserves. It is possible that such calculations are entirely in accord with the AGA's definition of proved reserves, but that, in light of other estimates considered significant by the producers, this definition has an anti-competitive effect. The agreement of the producers, with each other and with and through the AGA, to use such a restrictive definition as

the exclusive method of projecting the industry's position may have the effect—and, indeed, the purpose—of raising prices through its impact on purchasers and and government. The FTC's investigation is for the purpose of enabling it to determine whether the companies' practices constitute an "unfair method of competition." An unfair method of competition may result from concerted action even though there is no conspiracy by the dark of the moon. And as *Morton Salt* noted, the FTC may investigate either to develop the existence of a violation or to assure itself that none exists. 338 U.S. at 652.[28]

It is thus clear that the development and reporting of estimates at various stages of the investment and development process is reasonably relevant to the FTC's purpose. We therefore hold that the district judge's limitation of enforcement of the subpoena to only proved reserve estimates was erroneous.[29]

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[28] Another entirely legitimate result may ensue from an investigation of questionable conduct, even if the agency should conclude that the conduct does not violate existing law—the investigation may reveal the need for *changes* in the law. The underlying act gives the FTC the authority to conduct investigations for the purpose of making recommendations to Congress. 15 U.S.C. § 49. *See generally Davis, Administrative Law Treatise* §§ 3.02-.03.

[29] The dissent argues that the evaluation of the relevance of particular documents is "essentially factual in nature," and that the district court's conclusion on this point can therefore be reviewed only for "clear error" or "abuse of discretion." Dissenting op. at 8, 23-4, 31. Here, however, the district court's relevance determinations rested upon—and, indeed, were inseparable from—its view of the applicable law with respect to the proper scope of the FTC's investigation.

When relevance determinations are, in essence, factual judgments, they are normally entitled to special deference from appellate courts, at least where there are issues of credibility of witnesses. We need not pause to consider to

2. *The Bid Files*

In addition to ruling that only proved reserve estimates need be produced, the district court specifically found that "bid calculation data and bid calculation files" were irrelevant to the investigation, and therefore need not be produced.[30] Like the district court's general relevance determination, this more specific ruling is also premised upon the court's erroneous delineation of the scope and purpose of the FTC's investigation, and therefore, it, too, cannot be sustained.

Bid files are collections of documents developed for and used in nominating and bidding for the right to lease

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what extent the appellate court has greater latitude on review where, as here, the evidence was documentary, and raised no issues of credibility. Here the determinations of the trial court were dependent on, and integrally related to, a *legal* premise. In such a case, the appellate court has the authority —and the duty—to determine the proper legal premise and to correct the legal error of the trial judge, without limitation by the doctrines of "clearly erroneous" and "abuse of discretion" that are applicable to review of factual determinations. *See* Del. & Hudson Ry. Co. v. United Trans. Union, 450 F.2d 603, 620-1 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971):

> If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound. The reversal of the trial judge in no way reflects a determination that he was unreasonable or arbitrary, or chargeable with an abuse of discretion, but only and simply that his premise as to the applicable rule of law is deemed erroneous by the appellate court.

Id. See also Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 832 (D.C. Cir. 1972); Perry v. Perry, 190 F.2d 601 (D.C. Cir. 1951); Societe Comptoir de l'Industrie v. Alexander's Dept. Stores, 299 F.2d 33, 35-6 (2d Cir. 1962); Milsen Co. v. Southland Corp., 454 F.2d 363, 369 (7th Cir. 1971).

[30] The district judge ruled from the bench that bid files are irrelevant to the FTC's investigation. App. II 431a.

tracts in the federal domain for oil and gas exploration. According to the producers, bid files typically contain speculative reserve estimates, back-up data for such estimates—*i.e.*, raw geological data and interpretation thereof, and documents reflecting the calculation of the producer's bid.[31]

The producers maintain that bid files are not relevant to the determination of proved reserves, because bid files contain only speculative estimates which are of no further use once the company obtains a lease and begins exploratory drilling. The question, however, is not relevance to the calculation of proved reserves, but relevance to the FTC's investigative purpose. Admittedly, bid file estimates are quickly superseded by more accurate data, are not used to compute proved reserve figures, and may be completely erroneous predictions of the amount of natural gas eventually found. But any estimate of reserves—however defined—on which a company relies in the course of its business is relevant to the company's practices in estimating and reporting reserves.

We agree with the FTC that comparative information of this sort is "reasonably relevant" to its investigation. While, in response to the companies' arguments, the FTC has advanced several examples to demonstrate the relevance of bid files,[32] the Commission emphasized that this

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[31] Mobil Brief at 6. Bid files are considered highly confidential by the producers; a competitor who had access to the bidding model developed—at high cost—by another producer could easily outbid his opponent.

[32] The FTC suggests, for example, that bid files may contain proved reserve figures for adjacent tracts. These proved reserve figures could be compared with other proved reserve figures for the same tract maintained by the company. While Mobil asserts that none of its bid files contain such proved reserve figures, Mobil Brief at 17-18, the affidavit of a Commission attorney who has examined bid files of producers who complied with the subpoenas states that such files have

approach—which requires, in effect, the delineation of a particular theory of violation—is inappropriate in the pre-complaint stage; and here, too, we agree. While the FTC has not articulated the specific anti-competitive practices which may be present, it could not reasonably do so without access to the relevant documents.[33] Certainly a wide range of investigation is necessary and

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been found to contain proved reserve estimates, App. IV 633a. On this record we cannot conclude that the Commission's supposition is obviously wrong.

Moreover, the Commission suggests that bid files might be relevant in analyzing whether companies have deferred drilling in some circumstances in order to minimize the extent of proved reserves which would have to be reported. The district judge provided that if the FTC found a "situation where a company has been awarded a bid on a property and has delayed an unreasonable time in drilling on it so they could come up with a proper estimate, then you may apply and I will consider giving you the bid file on that particular one." App. II 431a. Without the bid files, however, it may be difficult, if not impossible, for the FTC to identify such instances.

The Commission also suggests that bid files could be used to establish lease histories; such histories would enable the Commission to examine the relationship, if any, between "speculative" and "proved" estimates. If the Commission were to find a reasonably stable relationship between these different estimates—if, for example, "speculative" estimates were *consistently* higher than the reported "proved" estimates, and by a roughly equivalent amount—this might well be indicative of anticompetitive practices.

[33] In *Moore Business Forms* v. *FTC*, *supra*, n. 23, the company argued against enforcement on the ground that the documents sought were not relevant—indeed, were "meaningless"—to the precise theory the Government would have to use to demonstrate a trade violation. 307 F.2d at 189. A panel of this court enforced the subpoenas *per curiam*, noting that the Commission had not yet ruled on the inherent factual question and that the court should not "anticipate" the Commission's determination by passing on that question. *Id.*

appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance.

3. *The Superior Order*

Apparently because Superior is not a member of the AGA and does not report proved reserve estimates to the AGA, the district judge denied enforcement of Specifications G through J in relation to Superior. Again, this ruling misconceives the nature of and unduly limits the FTC's investigation. Superior's argument that it cannot be guilty of a conspiracy to underreport proved reserve estimates to the AGA is not dispositive, because the FTC's investigation is not restricted to this theory. Superior does make reserve estimates for its fields in Southern Louisiana; therefore, it possesses information that could well be relevant to the FTC's inquiry. In point of fact, comparison of Superior's estimating process with that of a producer who does report to the AGA could be a useful analysis. At this stage, whether or not Superior has participated in some conduct that would amount to an unfair trade practice is certainly conjectural, but the Commission need not demonstrate that a complaint is likely to issue against Superior. We hold that the district judge erred in denying enforcement against Superior of major parts of the subpoena.

B. *Application of Collateral Estoppel*

The gas producers contended in the district court that, because the FTC determined in *So La II* that the AGA proved reserve data were accurate, the FTC is precluded from relitigating that issue by the principle of collateral estoppel.[34] Further, as we noted in our analysis of the

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[34] In addition, the producers argued that the doctrine of "primary jurisdiction" forecloses this issue to the FTC, since regulatory and fact-finding expertise concerning proved re-

district court's relevancy findings, the producers maintained that accuracy of the AGA's proved reserve estimates is all that the FTC is really trying to investigate.

On appeal there is some disagreement among the producers as to whether the district court applied a collateral estoppel theory in modifying the FTC's subpoenas. One group states that the district court "properly applied" collateral estoppel in its ruling;[35] another company, however, claims that collateral estoppel "is not properly an issue in this case,"[36] and still another professes indifference on the ground that it is not affected by the dispute.[37]

This confusion results from the district court's order, which did not detail findings of fact and conclusions of law. It is reasonably clear, nonetheless, that the district judge employed a variety of collateral estoppel to restrict the FTC's investigation. The order stated that the subpoenas were "improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves of the validity or accuracy of natural gas reserve estimates, *matters already considered and ruled upon by the Federal Power Commission* . . ." (emphasis added). In relation to the modifications of Specifications, G, H, and I, the court emphasized that all production under these specifications was to be made "for the sole purpose of permitting the

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serve estimates lies with the Power Commission. On appeal, and particularly on rehearing en banc, the producers have concentrated on collateral estoppel, rather than on a primary jurisdiction argument, presumably because the district court's order appears more likely to be premised on collateral estoppel.

[35] Texaco, *et al.* Supp. Brief at 2.

[36] Standard Oil (California) Supp. Brief at 2.

[37] Superior Supp. Brief at 2.

Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves." Thus, so far as we can tell, the district judge accepted the producers' theory that in essence the FTC was investigating only a conspiracy to underreport proved reserves to the AGA. While the court professed to acknowledge the FTC's right to determine "whether there exists any evidence of conspiracy in the reporting of [such estimates] to the American Gas Association," the court required the FTC to take as a "given" the accuracy of the AGA data.

Although, as we have discussed, the FTC's investigation is not focused exclusively on a mere recalculation of proved reserve estimates, the district court specifically precluded any FTC inquiry which would "determine" or even "investigate" the amount of such reserves. Such a restriction patently hamstrings the FTC's effort to compare various estimates made by the producers and necessitates constant vigilance by the Commission as to whether it has overstepped the bounds delineated by the court. Equally important, the district court's constriction of the FTC's purpose, to determine only the possibility of a conspiracy in the reporting of proved reserves to the AGA, when coupled with the premise that the reliability of the proved reserve data had been conclusively established by the FPC, resulted in the exclusion on relevancy grounds of all data not relating to proved estimates.

We have already determined that all of the data requested by the FTC is reasonably relevant to its inquiry. Given that assumption, the question remains whether the FPC's conclusions in a ratemaking proceeding can foreshorten the FTC's investigation; that is, whether the FTC can be collaterally estopped from investigating the

"amount of proved natural gas reserves." We conclude that collateral estoppel cannot be invoked to limit enforcement of the FTC's subpoenas.

As a general rule, substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding. The controlling case again is *Endicott Johnson*, where the Court stated that the petitioner had "advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not the kind that can be accepted as a defense against the subpoena." 317 U.S. at 509 (footnote omitted).[38] Moreover, in holding that an administrative subpoena must be enforced if the information is relevant to a lawful purpose of the agency, and not unduly indefinite or unreasonably burdensome, the Supreme Court has clearly rejected other defenses. The reasons for this rule are obvious. If parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed.[39] As the Court stated in *Oklahoma Press*,

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[38] While the defenses urged were briefly summarized by the Court in a footnote, *see* 317 U.S. at 509 n. 11, they were explained in greater (and here quite pertinent) detail in the Second Circuit's decision:

> Defendants also urge that application of the Walsh-Healy Act to their tanneries, etc., would be improper because of an alleged prior inconsistent "ruling" made, as to a different company, by the acting administrator, and because of certain conduct thought to "estop" the government. Consideration of these issues has no place in such a proceeding as this . . . . Perkins v. Endicott Johnson Corp., 128 F.2d 208, 224, *aff'd*, 317 U.S. 501.

[39] The instant case is an ample witness to the correctness of this rationale. Enforcement proceedings began in 1973.

> [P]etitioners' view, if accepted, would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. 327 U.S. at 213.

No substantive rights are negated by this restriction, for if a formal complaint is issued, subpoenaed parties may assert their defenses in the subsequent administrative proceeding. Further, the agency's final decision in that adjudicatory proceeding is reviewable by a court of appeals.

These principles have consistently been applied when jurisdictional defenses have been raised in enforcement proceedings. Two recent cases are illustrative. In *FMC v. Port of Seattle*, the Ninth Circuit held that the district court erred in limiting enforcement of Maritime Commission discovery orders to only those facts necessary to determine the Commission's jurisdiction to investigate the Port's consolidation services and in refusing to permit the Commission to inquire into the "details" of the consolidation services. 521 F.2d 431, 433-436 (1975). Similarly, the Seventh Circuit held in *SEC v. Savage* that the Commission was not required to establish its jurisdiction by demonstrating that a company's commodities future contracts were "securities" within the meaning of the Securities Act before the subpoena would be enforced. 513 F.2d 188, 189 (1975). The court emphasized that the company "would require SEC to answer at the outset of its investigation the possibly doubtful questions of fact and law that the investigation is designed and authorized to illuminate." *Id.*[40]

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[40] *See also* SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); FTC v. Gibson, 460 F.2d 605, 608 (5th Cir. 1972).

While the defense of collateral estoppel is very much akin to these jurisdictional questions,[41] it is, if anything, even more inappropriate in the investigatory context than questions of statutory coverage. Because a collateral estoppel defense rests on *factual* identities, an enforcing court to evaluate this defense must preview the ultimate complaint. In the instant case, the court must not only foretell the various theories which the FTC's evidence might support and all issues which conceivably might be raised in a FTC proceeding, but must also define all issues decided by the FPC. The court then must determine if an issue decided in the first proceeding is identical to an issue to be decided in the second proceeding. Such an exercise is unwise, if not impossible, and is in clear violation of the Supreme Court's admonition in *Oklahoma Press* that an agency's inquiry should not be limited by "forecasts" of the "probable results." 327 U.S. at 216.

That the enforcing court should not undercut the agency's investigative function by such hypotheses has been recognized by other courts of appeal. The Sixth and Seventh Circuits recently enforced subpoenas issued by the FTC in an investigation of taxicab companies for possible violations of the FTC Act, despite claims of res judicata and collateral estoppel based upon prior Government actions brought under the Sherman Act. In *FTC v. Markin*, 532 F.2d 541 (1976), the Sixth Circuit, analogizing to cases involving a question of agency coverage or jurisdiction, held that such defenses were premature in the enforcement proceeding:

[41] The producers specifically argued that the FTC had no "jurisdiction" to inquire into gas reserves, by virtue of both primary jurisdiction and collateral estoppel. App. II 218-220a, 226a. In the second hearing in the district court, the parties agreed to present their "jurisdictional" arguments first. *Id.* 331a-332a.

> Whether or not res judicata or collateral estoppel should be applied in this case depends on a variety of factual determinations which should be made by the Commission in the first instance . . . The basic weakness in respondents' position is that neither the district court nor FTC has sufficient information at the present time to make the factual findings required to resolve the principal issue of res judicata or collateral estoppel. The administrative proceeding should not be interrupted by judicial intrusion before the pertinent facts are determined and assessed by the Commission. *Id.* at 544.

The Seventh Circuit followed the same analysis in *FTC v. Feldman*, 532 F.2d 1092 (1976). Noting that interpretation of the factual data sought by the FTC would involve agency expertise and discretion, and that the FTC undoubtedly would consider, among other things, the effect of the prior litigation in deciding whether or not to formulate a complaint, the court concluded:

> We deem it the more appropriate and orderly procedure for the Commission to proceed with the investigation within its discretion. If it ultimately issues a complaint, appellants will then have an opportunity, depending on the issues raised by the complaint, or the proof thereunder, to assert the defense of res judicata or collateral estoppel, if they see fit. *Id.* at 1095.

In holding that collateral estoppel is not a proper defense to this enforcement proceeding,[42] we do not reach

[42] We do not hold that collateral estoppel can *never* be raised in defense to an investigative subpoena. Instances of abuse of a court's process can be imagined, though they are unlikely. In the instant case, we can perceive no reason to deviate from the general principles discussed above. Moreover, because we conclude that the assertion of collateral estoppel in this enforcement proceeding is premature, we need not reach the issue, discussed in Judge Leventhal's concurring opinion, of whether a determination in an essentially legislative ratemaking proceeding can ever be given preclusive effect.

the merits of the allegations that the FTC has intruded into the FPC's territory of expertise [43] and is attempting to relitigate an issue definitively settled by the Power Commission. We note, however, that this is an era of overlapping agency jurisdiction under different statutory mandates. In *United States v. RCA*, RCA contended that the Federal Communications Commission's approval of a television station exchange collaterally estopped the Justice Department from attacking the exchange in a separate civil antitrust suit. 358 U.S. 334, 338-39 (1959). The Supreme Court held that collateral estoppel was inapplicable because the FCC has no power to decide antitrust questions: "the issue in controversy before

[43] In this context we note that section 15(b) of the Federal Energy Administration Act of 1974, P. L. 93-275, 88 Stat. 96, 109 (May 7, 1974), provides:

> (b) Not later than one year after the effective date of this act, the Administrator shall submit a report to the President and Congress which will provide a complete and independent analysis of actual oil and gas reserves and resources in the United States and its Outer Continental Shelf, as well as of the existing productive capacity and the extent to which such capacity could be increased for crude oil and each major petroleum product each year for the next ten years through full utilization of available technology and capacity. The report shall also contain the Administration's recommendations for improving the utilization and effectiveness of Federal energy data and its manner of collection. The data collection and analysis portion of this report shall be prepared by the Federal Trade Commission for the Administration. Unless specifically prohibited by law, all Federal agencies shall make available estimates, statistics, data and other information in their files which, in the judgment of the Commission or Administration, are necessary for the purposes of this subsection.

Although this statute was enacted several years after the FTC commenced its investigation, it is at least indicative that Congress intends a major role for the FTC in the analysis of natural gas reserves.

the Commission was whether the exchange would serve the public interest, not whether § 1 of the Sherman Act had been violated." *Id.* at 352. Under the principles of *RCA*, what the FPC found to be consonant with the public interest could still be viewed by the FTC as an unfair method of competition. It therefore appears that a court should approach gingerly a claim that one agency has conclusively determined an issue later analyzed from another perspective by an agency with different substantive jurisdiction.

C. *Burdensomeness Determinations*

The FTC challenges the district court's limitation of production under Specifications G, H, and I to a random sample of 100 fields out of approximately 220 in Southern Louisiana and to the years 1969 through 1971. The Commission also disputes the district court's provision for production where the documents are located, rather than at FTC headquarters, at the option of the producer, with any reproduction costs to be borne by the FTC. These rulings ordinarily would seem to fall under the rubric of burdensomeness. In line with the *Oklahoma Press* requirement that the disclosure sought shall not be unreasonable, 327 U.S. at 208, the district court is authorized to impose reasonable conditions and restrictions with respect to the production of the subpoenaed material if the demand is unduly burdensome.[44] It appears that such modifications rest within the discretion of the trial judge and should be reversed by a reviewing court only for an abuse of that discretion.[45] In this

[44] Adams v. FTC, *supra* n. 20, 296 F.2d at 870 n. 7; *see* SEC v. Savage, 513 F.2d 188, 189 (7th Cir. 1975); SEC v. Brigadoon Scotch Distributing Co., *supra* n. 40, 480 F.2d at 1056; Genuine Parts Co. v. FTC, 313 F. Supp. 855, 857 (N.D. Ga. 1970), *aff'd*, 445 F.2d 1382 (5th Cir. 1971).

[45] *See* FTC v. Lonning, No. 75-1176, D.C. Cir., June 24, 1976 (slip opinion at 19-20); FCC v. Cohn, 154 F. Supp. 899,

case, however, it is clear that determinations of burden were intimately tied to the district court's constricted view of the FTC's investigation; that is, the district court found the subpoenas to be unreasonably broad and burdensome *because* they were, in the court's view, duplicative of FPC activities.[46] Since these dispositions

912 (S.D.N.Y. 1957); *cf.* NLRB v. Northern Trust Co., 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945). Most courts have not enunciated the correct scope of review. In *Adams v. FTC*, *supra* n. 20, for example, a panel of the Eighth Circuit overturned several modifications made by the district court on grounds of burdensomeness without specifically stating the applicable standard. *See* 296 F.2d at 867-870.

[46] That many of the restrictions were premised on a limited view of the FTC's inquiry is evident from the district judge's remarks towards the close of the second hearing:

> Well, Gentlemen, I think this: it is within their province to determine whether there has been any violation of the matters that are entrusted to them. For that I don't think it is necessary or proper that they endeavor to obtain and to determine the entire gas reserves available to all these companies, but it may well be pertinent that they get certain information to determine whether or not there has been a conspiracy to get together and violate some law in connection with these returns.
>
> So I think the better way to handle it would be for the Court to limit their discovery in such a manner as to cover the purposes and not go to all out to have a further determination of what the national gas reserve is.
>
> Now, how do we approach that? Your present subpoenas are certainly, it seems to me, too broad . . . .

App. II 397a.

In formulating the random sample limitation, the court stated,

> Say 100 out of 220, would give them, it seems to me, ample opportunity to prove any conspiracy if there is one. At the same time, it wouldn't let them get into the business of estimating all the gas reserves in the country.

App. II 438a.

were colored in substantial measure by an erroneous concept of the FTC's purpose, and rested at least in part on improper applications of collateral estoppel and relevance, we are not bound by an abuse of discretion standard[47] and therefore review these modifications for mere error.[48]

We emphasize that the question is whether the demand is *unduly* burdensome or *unreasonably* broad. Some burden on supoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party.[49] Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.[50] Broadness alone is not sufficient justification to refuse

[47] *Cf.* Colonial Times v. Gasch, 509 F.2d 517, 522-24 (D.C. Cir. 1975); Societe Comptoir de L'Industrie Cotonniere Establissements Boussac v. Alexander's Department Stores, Inc., 299 F.2d 33, 35-36 (2d Cir. 1962); Ring v. Spina, 148 F.2d 647, 650 (2d Cir. 1945).

[48] Arguably, these questions could be remanded to the district court for a reassessment, free from the errors made in the areas of collateral estoppel and relevance. This litigation already has been inordinately delayed, however; a proceeding usually summary in nature has stretched into years. In a protracted litigation of this sort, we need not return an issue "for another round of proceedings in the trial or appellate courts"—even if that issue is one which normally depends on trial court discretion—"if we can fairly dispose of it at this time." Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 340-41 (1971).

[49] *See* United States v. Powell, 379 U.S. 48, 58 (1964); FTC v. Standard American, Inc., *supra* n. 23, 306 F.2d at 235.

[50] *See* 379 U.S. at 58; SEC v. Brigadoon Scotch Distributing Co., *supra* n. 40, 480 F.2d at 1056; Genuine Parts Co. v. FTC, *supra* n. 44, 445 F.2d at 1391; Adams v. FTC, *supra* n. 20 296 F.2d at 867; FCC v. Cohn, *supra* n. 45, 154 F. Supp. at 912.

enforcement of a subpoena.[51] Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.[52]

There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one—and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations. Although some of the producers have alleged that the time and expense involved in compliance with the subpoenas as presently drawn would be extreme,[53] it is clear that clarification of some misunderstandings and limitation of some back-up data by the FTC staff have alleviated these concerns to some extent. Mobil Oil admits that the alleged burdensomeness of its subpoena was "substantially mitigated" during the course of extensive negotiations with Commission attorneys.[54] Moreover, we cannot ignore the fact that those gas producers who complied with the subpoenas were able to submit the required data without undue effort.[55]

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[51] Adams v. FTC, *supra* n. 20, 296 F.2d at 867. The Fifth Circuit has stated that the Commission must be accorded "extreme breadth" in conducting its investigations. Genuine Parts Co. v. FTC, *supra* n. 44, 445 F.2d at 1382, *citing* United States v. Morton Salt, 338 U.S. at 652.

[52] *See, e.g.*, SEC v. Savage, *supra* n. 44, 513 F.2d at 189; SEC v. Wall Street Transcript Corp., *supra* n. 20, 422 F.2d at 1381; FTC v. Standard American, Inc., *supra* n. 23, 306 F.2d at 235.

[53] *See, e.g.*, App. IX 1759a-1762a.

[54] Mobil Brief at 5; *see* App. XI 2014a-2031a.

[55] *See* FTC Brief at 52-53; App. IV 628a. Gulf Oil, a company with extensive natural gas operations, informed the Commission that 2028 man-hours were spent gathering the documents. Two other companies compiled, reproduced, and forwarded the data to the FTC within three months. *Id.*

We turn now to the specific limitations at issue. The FTC maintains that the random sample limitation would seriously undermine its ability to compare the data supplied by producers who volutarily complied with the subpoenas with the data from these producers. Comparison of the producers' estimates with all data submitted to the AGA for this region also would be foreclosed to some extent. The Commission notes that other studies have utilized random sampling techniques and that, in its opinion, such studies are inadequate for its purposes. We are reluctant to approve such a limitation in light of the fact that the district court rested its restriction largely on collateral estoppel grounds.[56] We therefore enforce the subpoena as originally conceived, without production on a random sample basis.

The district court's limitation of Specifications G through I to the years 1969, 1970, and 1971 also cannot be sustained. The impetus for the FTC investigation was the drop in 1968 and 1969 of proved reserves as reported by the AGA. Clearly data from an earlier period would be necessary for comparative purposes. The Commission's requirement of data beginning in 1962 is reinstated.[57]

The FTC argues that the producers' option to release the documents for inspection where they are stored, when coupled with the FTC's required assumption of any reproduction costs, is in derogation of the Commission's subpoena power. We agree. The FTC is specifically authorized to compel production of evidence "from any place in the United States, at any designated place of

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[56] *See* note 46 *supra*.

[57] The district court also changed the beginning date in Specification K from 1962 to 1966. This modification must fall for the same reason.

hearing." [58] While room for accommodation and compromise is certainly available, the district court's placement of the entire burden of travel and expense [59] on the Commission was unwarranted on this record.[60] We enforce the subpoena without this modification.

D. *Confidentiality Protection*

The district court imposed various conditions on the disclosure by the FTC of any documents designated as confidential by the producers. The producers are, of course, justifiably concerned about the confidentiality of these documents, some of which could be classified as trade secrets; however, the district court's order goes too far in an effort to protect these valid interests.

In essence, the order requires that any release or use of the documents beyond the investigation first be cleared with the court. Thus, the Commission apparently could not use the documents in an adjudicatory proceeding without gaining the court's permission. Nor could the Commission exercise its discretion to determine what

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[58] 15 U.S.C. § 49; *see* n. 9 *supra*. While this statute grants the FTC the power of "access" and the "right to copy" any documentary evidence of an entity under investigation, it also enables the FTC to require such evidence via a subpoena *duces tecum*. *See id.* Here the FTC chose to act pursuant to its subpoena power, not its access power.

[59] This is not a case in which the subpoena is directed to a third party not under investigation. *See* FTC v. Bowman, 149 F. Supp. 624, 630 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957). *Cf.* United States v. Friedman, No. 75-1277, 3rd Cir., Mar. 22, 1976 (slip opinion); United States v. Davey, 426 F.2d 842 (2d Cir. 1970); United States v. Dauphin Deposit Trust Co., 385 F.2d 129 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

[60] There is no indication that the bulk of these documents are in current business use; in fact, since the investigation is focused on the period 1962-1971, the situation appears to the contrary. *See, e.g.*, App. IX 1762a. *See also* FTC v. Standard American, Inc., *supra* n. 23, 306 F.2d at 235.

documents are exempt from public disclosure under the FTC Act or the Commission's rules.[61] Although the FTC's argument that the order would prohibit even the Commissioners from viewing the documents seems somewhat strained, the order would unquestionably place the court in a position of supervision and control over the Commission in the exercise of its statutory duties.

At least until the subpoenaed information has been made available to the agency and it has had an opportunity to rule on specific requests for confidential treatment, such a protective order is premature and improper. *See* FCC v. Schreiber, 381 U.S. 279, 290-1, 295-6 (1965).[62] Accordingly, we accept with some modifications, the FTC's proposed confidentiality protection, which would provide notice to the producers of any FTC decision. Specifically, we order that the FTC not disclose any of the documents produced which a company designates as confidential to any person [63] outside the employ of the FTC (other than an outside consultant retained by the

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[61] *See* 15 U.S.C. § 46(f); 16 C.F.R. §§ 3.45, 4.10, 4.11.

[62] In the past, some courts have conditioned enforcement of an agency subpoena upon a protective order. *See, e.g.*, FTC v. *Menzies*, 145 F. Supp. 164 (D. Md. 1956), *aff'd*, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957); FCC v. Cohn, *supra* n. 45, 154 F. Supp. at 912-913. The *Schreiber* decision makes clear, however, that it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality. *See* 381 U.S. 295-6. *See also* FTC v. United States Pipe and Foundry Co., 304 F. Supp. 1254, 1260 (D.D.C. 1969), FTC v. Green, *supra* n. 24, 252 F. Supp. at 157; Gellhorn, "The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices," 36 *U.Chi.L.Rev.* 113, 126 (1968).

[63] We think it not unreasonable to require notice to the producers even in the event of a proposed release to Congress, since the circumstances surrounding such a disclosure cannot presently be ascertained. *See* Ashland Oil v. FTC, No. 76-1174 (D.C.Cir. Sept. 20, 1976).

FTC who has agreed not to disclose the documents) without first giving the company ten days' notice of its intention to do so. Such a procedure would, of course, provide an opportunity for judicial review at some later date, if the producers believe that a particular proposed disclosure is improper.

IV. Conclusion

Using its own conception of the proper scope of the FTC's investigation, the district court limited the subpoena on a composite of relevance and collateral estoppel grounds. We have determined that these limitations, which effectively blocked legitimate avenues of the FTC's inquiry, cannot be reconciled with the narrow ambit—as defined by the Supreme Court—of a court asked to enforce an agency's investigative subpoena. We have also concluded that the district court erred in terms of other modifications founded on burdensomeness, and that certain confidentiality restrictions operated to usurp the agency's initial decision-making power. We therefore enforce the subpoenas as issued by the FTC, with the exception of the two modifications, in regard to raw filed data and the suspected location of nautral gas in currently unleased acreage, proposed by the FTC and accepted by the producers.[64] We also charge the FTC with implementation of the modifications to Specifications G through K offered by the Commission but rejected by the producers as unacceptable for settlement purposes.[65] Pro-

[64] Stipulation re Issues on Which Parties Have Agreed and Issues Which Remain to Be Resolved by the Court, May 19, 1976, at 5.

[65] *Id.* at 7-9, ¶ 15-17; FTC's Statement of Issues and Proposed Modifications (re Superior Oil), May 19, 1976, at 3-5, ¶ 5-8.

duction is to be made within 90 days of the date of this opinion.[66]

So Ordered.

[66] The district court ordered that the documents be produced within 180 days. However, the experience of those companies that have already complied with the subpoenas—evidence which was, of course, not available to the district court—indicates that 90 days should suffice. *See* notes 54 and 55 *supra* and accompanying text. To remand this issue to the district court for re-evaluation in light of this new evidence would only prolong this already protracted litigation unnecessarily. *See* note 48 *supra*.

APPENDIX A

SUPOENA DUCES TECUM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

To Mr. A. C. Long, Chairman Executive Committee & Chief Executive Officer,

Texaco, Inc., 135 East 42nd Street, New York, New York. 10017

You are hereby required to appear before Donald K. Tenney, an Attorney and Examiner of the Federal Trade Commission, at Room 368, Federal Trade Commission Building, 6th and Pennsylvania Avenue, N.W., in the City of Washington, D.C. 20580 on the 5th day of January, 1972, at 10:00 a.m., to testify in connection with the Commission's investigation of various corporations and persons, File No. 711 0042, pursuant to Commission Resolution dated June 3, 1971, a copy of which is attached and made a part hereof, for the purposes stated therein.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached "Definitions" and "Specifications."

Fail not at your peril

In testimony whereof, the undersigned, an authorized official of the Federal Trade Commission, has hereunto set his hand and caused the seal of said Federal Trade Commission to be affixed at Washington, D.C., this 24th day of November, 1971.

[SEAL]

/s/ _____
Assistant Director, Bureau of Competition.

DEFINITIONS

As used herein, the term "documents" means all writings of every kind including books, records, folios, minutes, reports, memoranda, correspondence, agreements, discounted cash flow studies, cover sheets, calculation sheets, print outs, telegrams, diary entries, pamphlets, notes, charts, and tabulations in the possession, custody or control of the Company. The term "documents" also includes voice recordings and reproductions or film impressions of any of the aforementioned writings as well as copies of documents which are not identical duplicates of the originals and copies of documents of which the originals are not in the possession, custody or control of the Company. The term "documents" further includes all punch cards or other cards, tapes or recordings used in data processing, together with the programming instructions and other written material necessary to understand or use such punch cards, tapes or other recordings.

In response to specifications in which the term "documents" is followed by an asterisk (*), a verified written statement by an officer of the company containing the requested information may be submitted in lieu of the documents called for provided that the underlying documents or source materials are listed or otherwise specifically identified in, or as part of, such verified statement.

Each document submitted must be identified as to the specification or specifications to which it is responsive.

The term "the Company" means the corporation upon which this Subpoena was served as well as its directors, officers, employees, and agents; its subsidiaries and affiliates; and the directors, officers, employees and agents of its subsidiaries and affiliates. The term "the corporation" means the corporation upon which this Subpoena was served.

Unless otherwise stated, the following definitions apply to the specifications that ensue:

1. *South Louisiana.* That geographical area delineated by Map III, page 84, of the May, 1971 edition of *Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity as of December 31, 1970* including the offshore area. The term "Offshore South Louisiana" is defined as that geographic area which lies seaward from the Louisiana coastline. The South Louisiana Offshore Area is sometimes referred to as Federal Areas 1 through 4 and includes the West Cameron Area, East Cameron Area, Vermilion Area, South Marsh Island Area, Eugene Island Area, Shoal Area, South Pelto Area, Bay Marchand Area, South Timbalier Area, Grand Isle Area, West Delta Area, South Pass Area, Main Pass Area, Breton Sound Area, Chandeleur Area and Chandeleur Sound Area and any additions thereto, as indicated on the United States Geographical Survey "Oil and Gas Development Map of the Gulf Coast State of Louisiana Outer Continental Shelf", as revised on January 5, 1971.

2. *Net Production.* The definition appearing in *Technical Report No. 1*, Standard Definitions for Petroleum Statistics (First Edition, July 1, 1969), at page 11, is adopted.

3. *Natural Gas Present or Recoverable or Ultimately Recoverable.*

a. *Present.* Natural Gas in place, i.e., existing either in the gaseous phase or in solution with crude oil in a natural underground reservoir or reservoirs.

b. *Recoverable.* Natural gas in place that is producible.

c. *Ultimately recoverable.* Natural gas in place that is producible, together with its cumulative production.

4. *Field.* A field is an area consisting of a single reservoir or multiple reservoirs all grouped on, or related to, the same individual geological features and/or stratigraphical condition. A reservoir is a porous and permeable underground formation containing an individual and separate natural accumulation of hydrocarbons (oil and/or gas) which is confined by impermeable rock or water barriers and is characterized by a single natural pressure system.

5. *Completion Date.* The first date on which any permanent equipment for the production of oil or gas is installed in a well. Completion reports may relate to the abandonment of a well or to the installation of permanent productive equipment.

6 & 7. *Associated Gas; Dissolved Gas.* The definitions of these two terms that appear in *Technical Report No. 1*, Standard Definitions for Petroleum Statistics (First Edition, July 1, 1969), page 6, are adopted.

8. *Nonassociated Gas.* Natural gas which is in a reservoir or reservoirs not containing significant quantities of crude oil.

9-13. *Proved Reserves; Revisions; Extensions; New Field Discoveries;* and *New Reservoir Discoveries in Old Fields.* The definitions of these five terms that appear in *Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity as of December 31, 1970* at pages 102-104, are adopted.

14. *Dedicated Reserves.* The volume of natural gas committed to a pipeline company and for which both the seller and the pipeline company have received certificate authorization from the Federal Power Commission.

SPECIFICATIONS

A. Documents * which will indicate the correct legal name and business address of the corporation, its date and state of incorporation, and the name, position and home address of each officer and director of said corporation.

B. Documents * which will indicate the correct legal name and business address of the parent of the corporation, the date and state of incorporation of the parent and the percentage ownership the parent has in the corporation, and the name, position and home address of each officer and director of the parent.

C. The corporation's Annual Reports for each of the years 1966, 1967, 1968, 1969 and 1970.

D. Documents * which will indicate the name and address of each subsidiary, affiliate, and division of the corporation and of the divisions of each such subsidiary and affiliate engaged in the exploration, development, production, or distribution of natural gas; the function(s) as heretofore set forth of each; and the dates and states of incorporation and the names, positions, and addresses of officers, directors, managers of each subsidiary, affiliate, and division.

E. Documents * which will indicate (1) each type of customer purchasing natural gas, produced in South Louisiana, from the corporation, its subsidiaries and affiliates and (2) the manner and methods of distribution of such natural gas to each type of customer.

F. Documents * which will indicate the following for each of the years 1966 through 1970:

1. Total net production of natural gas, in units, in (a) the United States and (b) South Louisiana, by the corporation, it subsidiaries and affiliates.

2. Total unit and dollar volume of sales of the total net production of natural gas produced in (a) the United States and (b) South Louisiana, by the corporation, its subsidiaries and affiliates.

3. Total dollar volume of sales of the total net production of natural gas produced in South Louisiana by the corporation, its subsidiaries and affiliates to each type of customer identified in Specification E(1)—for 1969 and 1970 only.

G. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time between January 1, 1962 to December 31, 1970, which contain estimates or evaluations of the volume of natural gas present or recoverable or ultimately recoverable (1) throughout all of South Louisiana (2) throughout all of Offshore South Louisiana and/or (3) in specific fields, portions of fields, leaseholds and/or portions of leaseholds located in Offshore South Louisiana.

Excluded from this specification are any documents previously made available to the Commission by the American Gas Association and presently in the custody of Price, Waterhouse & Company, 1801 K Street, Washington, D.C. Included in this specification by way of illustration but not limitation are documents containing estimates or evaluations including re-estimates or reevaluations made in connection with or in preparation for or as the result of the following: (1) bidding on or nominating leases (2) deciding whether to erect permanent platforms (3) compiling or inventorying total company reserves or supply (4) negotiating or contracting for the sale of natural gas, or for the joint or com-

mon exploration, development, production, purchase or sale of acreage, or for obtaining bank loans (5) filing depreciation expense schedules with Internal Revenue Service or (6) submitting field-by-field estimates to subcommittees or committees of the American Gas Association or the American Petroleum Institute.

H. Documents * indicating any or all of the following with regard to each field and leasehold in Offshore South Louisiana for which estimates or evaluations of the volume of natural gas, pertaining to the whole or a portion thereof, are produced pursuant to Specification G:

1. For each such field and portion thereof, its name and the number(s) of each block number comprising said field or portion thereof—if the field or field portion is situated at least in part in a portion of a block, the portion of the block as well, e.g., "NW ¼";

2. For each such leasehold and portion thereof, the OSC number and name(s) and location(s) of the field(s) and portion(s) thereof comprising such leasehold or portion thereof;

3. The pipeline company(ies) serving each such field, leasehold, or portion thereof;

4. The producer(s) and the operator(s) of each such field, leasehold, or portion thereof, indicating the precise interest each such producer and operator has in the acreage;

5. For each such field, leasehold and portion thereof, the location (on the map) and designation of each well drilled including (for each such well):

a. The current status as classified by the Company, e.g., "dry and abandoned", "temporarily abandoned", "suspended", "shut-in", "service", "producer", etc.;

b. Whether classified by the Company as an oil or gas well at the time of (1) application for drilling (2) the filing of each completion report (3) currently;

c. The number of reservoirs containing natural gas that have been penetrated by the well;

d. The date drilling commenced; the date total depth was reached; first date of testing; first date of testing officially reported; completion date; date commenced producing.

I. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1962, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. Any natural gas estimates or evaluations called for by Specification G; the preparation or completion of such estimates or evaluations; the procedures, criteria or interpretations used in such preparation or completion; the identity of organizational units and personnel of the Company involved in such preparation or completion;

2. Any natural gas estimates or evaluations made available to the Commission by the American Gas Association and presently at Price, Waterhouse & Co., or appearing in any American Gas Association Report on Natural Reserves, published subsequent to January 1, 1967, including the constituent categories of these estimates such as "proved reserves", "revisions", "extensions", "new field discoveries", "new reservoir discoveries in old fields"; the preparation or completion of such estimates or evaluations; the procedures, criteria or interpretations used in such preparation or completion; the organizational units and personnel of the Company involved in such preparation or completion;

3. Any lease nominations and bids, any agreements for joint or common leasing, exploration, development, production, purchase or sale, or any cash flow or economic feasibility studies preparatory to leasing, exploring, developing, purchasing or selling, which involve Offshore South Louisiana acreage;

4. Any compilation, report or study of "dedicated reserves";

5. Whether any well designated in response to Specification H—5 contains natural gas in sufficient quantities as to be capable of producing in paying quantities.

J. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1966, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. Any failures or delays, for whatever reason, in reporting proved reserves of natural gas to the American Gas Association, including any failures or delays by personnel of the Association to identify to subcommittee members all fields containing proved reserves;

2. The classification or exclusion or inclusion of volumes of natural gas as proved reserves;

3. The relationship between increases or decreases of crude oil proved reserves with increases or decreases of associated, dissolved or associated-dissolved natural gas proved reserves;

4. Negative revisions to American Gas Association proved reserve estimates because of clerical or mathematical error.

K. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1962, which refer, analyze,

compare, comment on, set forth, and/or relate to any or all of the following:

1. The relation between the amount of "proved reserves" and the rate allowed, to be allowed, or that may be allowed for natural gas by the Federal Power Commission;

2. The reporting of lower "proved reserve" figures.

L. Documents * naming all employees of the corporation, its subsidiaries and affiliates who have, any time since January 1, 1966 with regard to Offshore South Louisiana, estimated, evaluated or enumerated natural gas proved reserves, dissolved gas proved reserves, potential gas supply or well drilling activity either for the American Gas Association, American Petroleum Institute, Potential Gas Committee, American Association of Petroleum Geologists or the International Oil Scouts, including local scout checks, indicating for each person named (1) the association for which he estimated or enumerated (2) whether a member of the association (3) what was estimated or enumerated and (4) the dates for which he estimated or enumerated for the particular association.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1089-73
FEDERAL TRADE COMMISSION
v.
TEXACO, INC.

Civil Action No. 1090-73
FEDERAL TRADE COMMISSION
v.
STANDARD OIL CO. (INDIANA)

Civil Action No. 1092-73
FEDERAL TRADE COMMISSION
v.
EXXON CORPORATION

Civil Action No. 1093-73
FEDERAL TRADE COMMISSION
v.
SHELL OIL COMPANY

Civil Action No. 1095-73
FEDERAL TRADE COMMISSION
v.
STANDARD OIL COMPANY OF CALIFORNIA

Civil Action No. 1096-73
FEDERAL TRADE COMMISSION
v.
MOBIL OIL CORPORATION

ORDER

The Federal Trade Commission ("Trade Commission") having petitioned on June 13, 1973, for enforcement of subpoenas *duces tecum* issued by an Assistant Director of the Trade Commission's Bureau of Competition to each of the above captioned respondents on November 24, 1971, in the course of a Trade Commission investigation into natural gas reserve reporting procedures (FTC Investigation File No. 7110042); and the respondents having opposed enforcement of said subpoenas, contending that the principles of primary jurisdiction and collateral estoppel preclude the Trade Commission from seeking the demanded documents or data for purposes of determining the validity or accuracy of natural gas reserve estimates, and contending further, *inter alia*, that certain demands of the subpoenas are irrelevant to any proper subject or area of investigation and are unduly broad and burdensome; and the parties having fully briefed and presented oral argument on the issues; and the Court upon consideration of all the premises, being of the opinion that the Trade Commission is authorized to pursue the investigation to determine whether there exists any evidence of conspiracy in the reporting of proved natural gas reserve estimates to the American Gas Association by respondents, but that the subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves or the validity or

accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission, and the Court being of the further opinion that the subpoenas are improper in other respects as well and should not be enforced as issued:

It is now therefore ordered:

1. Enforcement of specifications A, B, C, D, E, and F of the subpoenas *duces tecum* is hereby granted. Enforcement of specifications G, H, I, J, K, and L is hereby denied except as provided below.

2. Respondents shall produce documents as called for by specifications G, H, and I of the subpoenas *duces tecum* for the years 1969, 1970 and 1971, subject to the following modifications and limitations:

(a) Production shall be limited to documents containing or underlying proved natural gas reserve estimates. Raw field data, bid calculation data, and bid calculation files are not required to be produced. As regards underlying back-up data for each estimate called for by specification G, only the immediate data used to make the estimate need be submitted. For estimates arrived at volumetrically, specification I(1) will be satisfied by supplying all the underlying numbers which were used in the formula including the recovery factor and the size of the reservoir(s). As for the estimates arrived at by pressure decline curves, specification I(1) will be satisfied by submitting the curve used.

(b) Production of documents shall be made with respect only to a random sample of 100 of those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves. This random sample shall be selected by a procedure agreed upon between Trade Commission and respondents.

(c) Each respondent shall make production with respect to the fields, selected in the manner described in paragraph 2(b), in which it had an ownership interest as of the date reports were submitted by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

(d) All production ordered pursuant to this paragraph 2 shall be made for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves.

3. Respondents shall produce documents as called for by specifications J and K of the subpoenas *duces tecum*, subject to the following modifications and limitations:

(a) Production shall be limited to documents relating to proved natural gas reserve estimates in those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

(b) Production shall be limited to documents prepared or dated during the years 1966 through 1971, inclusive, which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondent or others, including the American Gas Association.

4. Respondents shall produce documents as called for by specification L, except production shall be limited to the employees who have acted with respect to proved natural gas reserve estimates for offshore Southern Louisiana during the year 1966 through 1971, inclusive.

5. In complying with this Order, the definition of terms contained in the original subpoenas *duces tecum* shall apply.

6. Respondents shall comply with this Order within 180 days after the date upon which they are advised of the sample fields selected in accordance with paragraph 2(b) hereof.

7. Each respondent shall have the option of producing documents called for by this Order at the corporate office or field location where the responsive documents are normally maintained or at the Federal Trade Commission's offices in Washington, D.C. With respect to documents as to which any respondent elects to make production at a corporate office or field location, the Trade Commission shall inspect and reproduce any of said documents at such office or field location at, such other location as agreed upon by the respective parties, and shall bear any costs of reproduction or copying which the Trade Commission may require or desire.

8. Any document produced under this Order which contains confidential information may be designated as being confidential by the respective respondents, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary of the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of

any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respective respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

9. The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

So ordered this 22nd day of March, 1974.

/s/ George L. Hart, Jr.
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1091-73

FEDERAL TRADE COMMISSION

v.

SUPERIOR OIL COMPANY,

ORDER

Upon consideration of the Federal Trade Commission's petition for enforcement of a subpoena *duces tecum*, the matter having been fully briefed and argued before the Court, and the Court being advised in the premises, it is this 22nd day of March, 1974,

ORDERED, That the respondent, The Superior Oil Co., Inc., shall comply, within 180 days from the date on which this Order becomes final, with Specifications A through F and K through L of the subpoena, provided that Specifications A, B. D. E and F may be complied with by submitting a verified written statement by an officer of the Company containing the requested information in lieu of the documents specified, and it is

FURTHER ORDERED, That as to the respondent, The Superior Oil Co., Inc., Specifications G through J of the subpoena be, and the same hereby are, denied enforcement and quashed; and it is

FURTHER ORDERED, That any document produced under this Order which contains confidential information may be designated as being confidential by the respondent, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commisioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for

the purposes of providing other and further relief as necessary.

SO ORDERED THIS 22 DAY OF MARCH, 1974.

GEORGE L. HART, JR.
George L. Hart, Jr.
Chief Judge

LEVENTHAL, *Circuit Judge concurring*: I concur fully in Chief Judge Bazelon's majority opinion. I write separately to record another strand of doctrine that supports the court's judgment. In substantial if elusive measure the District Court projected the defense contention that the FTC is collaterally estopped from investigating certain matters because of a prior determination by the FPC in the course of ratemaking. In my view the whole doctrine of preclusive effect, whether cast as collateral estoppel or res judicata, is inapplicable to the conclusion of an agency exercising such a legislative function as ratemaking, *Arizona Grocery Co. v. Atchison, Top. and Santa Fe. Ry. Co.*, 284 U.S. 370, 389 (1932); 2 K. Davis, Administrative Law Treatise, § 18.08 at 597 (1958). The doctrines of res judicata and collateral estoppel preclude litigation of an issue even though a "wrong" result was reached the first time. But the Federal Power Commission itself would not have been precluded from changing its mind concerning reserves if it had started a new ratemaking investigation, and would not be precluded from starting a new investigation to consider whether it should change its mind or method.

In recent years, I am aware, notions of res judicata and collateral estoppel have been extended as to administrative proceedings. *See Cartier v. Secretary of State*, 165 U.S.App.D.C. 130, 135 n.3, 506 F.2d 191, 196 n.3, *cert. denied*, 421 U.S. 947 (1974). Authoritative doctrine, however, still retains the concept that such preclusive effect is to be accorded determinations "in a judicial capacity." *United States v. Utah Construction Co.*, 384 U.S. 394, 422 (1966). The need for finality with respect to appraisal of an event that has passed outweighs any desire the agency may have to change its policies for future rulings.

Different considerations emerge, and a different balance is struck, when an agency exercises an essentially

legislative function like ratemaking, especially the kind of broad area ratemaking lately conducted by the Federal Power Commission. The agency must remain free "to adapt [its] rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). Changes may occur not only in objective circumstances but in the way the agency perceives the critical facts, whether, say, service life of equipment, or calculations of gas reserves. With such legislative activity focused primarily prospectively, the need for flexibility outweighs any interest in repose. Thus, the Supreme Court has repeatedly held that an individualized ratemaking is not res judicata.[1] The pertinent considerations are multiplied when what is involved is the kind of broad ratemaking now conducted by the FPC, an approach approved in *Permian Basin*, and now used with rulemaking procedures.[2]

Of course, the Rule of Administrative Law restrains agencies from "arbitarily" or "capriciously" reopening earlier determinations and reaching new results. An agency changing its course must be able to explain its departure from prior policy. *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971). Some comparable doctrine may be fashioned to prevent arbitrariness even when a second agency is involved. Whether a determination has been arbitrary is an entirely different question, however, from whether inquiry has been precluded by a prior determination that is

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[1] Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 445 (1930); State Corporation Commission v. Wichita Gas Co., 290 U.S. 561, 569 (1934); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 64 (1936).

[2] *See* Shell Oil Company v. FPC, 520 F.2d 1061 (5th Cir. 1975).

binding. The FTC, in the exercise of its functions and responsibilities, has only begun to seek out the relevant facts. One cannot possibly say that it is acting unreasonably in beginning its examination. The opinion of Chief Judge Bazelon effectively establishes that conclusion.

WILKEY, *Circuit Judge*, with whom joined MacKinnon, *Circuit Judge*, dissenting: This litigation is an outgrowth of a Federal Trade Commission (FTC) investigation into the reporting of natural gas reserves by natural gas producers in Southern Louisiana:[1] The issues concern

[1] Outline of this opinion:

OUTLINE

the District Court's action in modifying and enforcing the *Trade* Commission's subpoenas.

We see the issues in this case quite differently from the majority. Fundamentally, our colleagues state the issues and write as if the court were reviewing directly the action of the Trade Commission in issuing these subpoenas. We are not. We are reviewing the action of a District Court in modifying and enforcing those subpoenas. It is the validity and reasonableness of the District Court's action which we judge. What we review and the standards we employ are determined by that.

The District Court modified the subpoenas in two principal ways: (A) limiting the material to be produced to any and all material containing data on *proved* reserves and their reporting; and (B) limiting the use of the data to purposes other than establishing the accuracy of the proved reserve figures, such estimates having been established for the same time period by three separate investigations of the Federal *Power* Commission.

In so modifying and enforcing the subpoenas the District Court acted on three separate and independent grounds: (1) relevance of the data sought to the purpose of the Trade Commission investigation, the reporting of proved gas reserves (applicable to the content or production limitation); (2) burdensomeness of producing material already twice or thrice furnished before (applicable to both the content and use limitations); (3) administrative collateral estoppel as to one finding of fact, the accuracy of the proved reserve figures, already made by the agency primarily responsible, the Federal Power Commission (applicable to the use limitation).

The first two grounds are essentially factual, within the sound discretion of the District Court, and must be respected unless clearly erroneous. The third ground is a question of law, initially for determination by the District Court.

I. The Facts, the Issues, and the Arguments

A.

The American Gas Association (AGA) is a trade association of producers, distributors, and marketers of natural gas. Through its Committee on Natural Gas Reserves, the AGA has since 1946 been providing the industry, the Government, and the general public with annual estimates of the *proved* natural gas and natural gas liquid reserves of the United States.[2]

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[2] Throughout this opinion we will use the term "proved reserves." The following is the definition of proved reserves adopted by the AGA in its annual publication, "Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity," Volume 28, June 1974. The first two paragraphs of the following definition appear on page 103 of this publication, the third paragraph is derived from page 99 and the last paragraph is derived from pages 96 and 97 (emphasis added):

> Proved Reserves are the estimated quantity of natural gas which analysis of geologic and engineering data demonstrate with reasonable certainty to be recoverable in the future from known oil and gas reservoirs under existing economic and operating conditions. Reservoirs are considered proved that have demonstrated the ability to produce by *either actual production or conclusive formation test.*
>
> The area of a reservoir considered proved is that portion *delineated by drilling* and defined by gas-oil, gas-water contacts or limited by the structural deformation *or* lenticularity of the reservoir. In the absence of fluid contacts, the lowest known structural occurrency of hydrocarbons controls the proved limits of the reservoir. The proved area of a reservoir may also include the *adjoining portions* not delineated by drilling but which can be evaluated as economically productive on the basis of geological and engineering data available at the time the estimate is made. Therefore, the reserves reported should include total proved reserves which may be in

In May 1969 when the AGA reported its 1968 figures, they indicated a decline in proved reserves nationally, the first such decline ever reported. Before the year 1969 was out, this and other information reaching the Federal *Power* Commission (FPC) prompted a reopening of its just-concluded Southern Louisiana Area Rate Proceeding.

In late 1970 the Federal *Trade* Commission began an investigation into the reporting of natural gas reserves in Southern Louisiana. On 3 June 1971 the investigation achieved more formal status when the Trade Commission issued a resolution authorizing the use of compulsory process in furtherance of a nonpublic investigation. From the beginning of the investigation the AGA cooperated with the Trade Commission on a voluntary basis. As a result the Commission was able to obtain the field-by-field estimates of proved reserves made by each Southern Louisiana subcommittee member for the years 1966 through 1970.[3] The Commission also ob-

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either the drilled or undrilled portions of the field or reservoir.

Natural gas reserves take into account the shrinkage of the reservoir gas volume resulting from the removal of the liquefiable portions of the hydrocarbon gases and the reduction of volume due to the exclusion of non-hydrocarbon gases where they occur in sufficient quantity to render the gas unmarketable.

The proved reserves estimated are to include all gas reserves regardless of size, availability of market, ultimate disposition or use.

See also note 91 *infra*.

[3] These statistics were made available to the FTC subject to an agreement restricting access to and disclosure of the data. The agreement provided, *inter alia*, that:

(2) Representatives of your Bureau [i.e., the Commission's Bureau of Competition] will make use of such reports only in connection with its current investigation

tained reserve information from Form 15 reports filed with the Federal Power Commission. These reports are filed by interstate natural gas pipelines and list recoverable, saleable gas reserves committed to, collected by, or held by reporting pipelines.

Approximately one year after beginning its investigation, on 24 November 1971, the Commission staff issued identical administrative subpoenas *duces tecum* to eleven natural gas producers. All eleven producers moved to

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into the reporting of natural gas reserves by the American Gas Association, and for the purpose of verification of natural gas reserves estimates reported by the A.G.A. Committee on Natural Gas Reserves; and *shall not release, disclose, disseminate or publicize* in any manner, to any person, any statistic or data contained in such reports, unless otherwise available in published records or documents, *without twenty days prior notice, and opportunity to seek appropriate legal protection or relief*, to A.G.A. and to each member of the South Louisiana Subcommittee whose statistics are to be disclosed by the Commission.

Supplemental Brief for Appellee Mobil Oil Corp. (filed 4 April 1975), Exhibit A at 2. (Emphasis supplied). The agreement also provided that custody of the documents be maintained by a neutral third party, Price Waterhouse & Co.

The producers have alleged in supplemental filings before this court that the FTC breached this agreement by releasing to a Congressman certain staff and working papers containing excerpts from the AGA reserve statistics after less than 72 hours' notice. In a reply the Commission conceded that it had released the information to the Congressman, who *by a phone call* "required that the documents be immediately released" to him. The Commission argues, however, that the above paragraph was intended to prohibit disclosure of the data to the public or to competitors, and was not meant to cover the case where a member of Congress or congressional committee might immediately require use of the data. In addition, the Trade Commission argues that it lacks the statutory power to keep this data confidential when a Member of Congress demands disclosure.

quash the subpoenas. Following the Commission's denial of the motions, the Trade Commission's staff, after negotiations with the gas producers, offered additional safeguards for confidentiality of the information to be supplied. As a result two producers agreed to comply fully with the subpoenas and one agreed to comply in part. Soon after petitions for enforcement were filed in the District Court, one more firm agreed to comply with the subpoena.

Petitions for enforcement of the remaining subpoenas were filed in the District Court on 4 June 1973. The two orders here under review were filed on 22 March 1974. One order covered the subpoenas issued to appellees Texaco, Inc., Standard Oil Co. (Indiana), Shell Oil Co., Exxon Corp., Standard Oil Co. of California, and Mobil Oil Corp. (hereinafter the "Six-Company Order") and enforced specifications A through F and K through L in full.

During the hearings held on 30 July and 13 December 1973, the District Court found the subpoenas to be overly broad and unduly burdensome because they sought to duplicate investigations of the Federal Power Commission which had already resulted in a finding that AGA *proved* reserve estimates were valid and accurate. As a result, specifications G through I were modified so that raw field data, bid calculation data, and bid calculation files need not be produced.[4] However, all documents, *wherever located*, containing or underlying *proved* reserve estimates in the Southern Louisiana area are to be produced under the District Court's order.

[4] Preliminarily, it is necessary to recognize the central importance of specification G of the FTC's subpoena. This specification, if left *un*modified by the District Court's order of any of the subsequently agreed upon stipulations, calls for the production of

> Documents either received (from whatever source) or written by the Company, in whole or in part, at any time between January 1, 1962 to December 31, 1970, which contain estimates or evaluations of the volume of natural gas present or recoverable or ultimately recoverable (1) throughout all of South Louisiana (2) throughout all of Offshore South Louisiana and/or (3) in specific fields, portions of fields, leaseholds and/or portions of leaseholds located in Offshore South Louisiana.
>
> Excluded from this specification are any documents previously made available to the Commission by the American Gas Association and presently in the custody of Price, Waterhouse & Company, 1801 K Street, Washington, D.C. Included in this specification by way of illustration but not limitation are documents containing estimates or evaluations including re-estimates or reevaluation made in connection with or in preparation for or as the result of the following: (1) bidding on or nominating leases (2) deciding whether to erect permanent platforms (3) compiling or inventorying total company reserves or supply (4) negotiating or contracting for the sale of natural gas, or for the joint or common exploration, development, production, purchase or sale of acreage, or for obtaining bank loans (5) filing depreciation expense schedules with Internal Revenue Service or (6) submitting field-by-field estimates to subcommittees or committees of the American Gas Association or the American Petroleum Institute.

FTC Subpoena, App. I at 54a. This is the most significant specification of the subpoena not only because of the enormous breadth of its coverage but also because the next two specifications (H and I(1)) define their breadth by referring back to the documents produced pursuant to specification G. *Id.* at 55a-56a.

The court, in an attempt to make the subpoenas less burdensome, limited production of the documents called for by specifications G through I to a random sample of 100 out of the approximately 225 relevant fields and to the years 1969, 1970, and 1971. Specifications J, K, and L were also modified so that only documents relating to proved natural gas reserve estimates in the offshore

Southern Louisiana area need be submitted. The court, however, enforced the subpoena as regards any documents prepared between 1966 and 1971, inclusive, "which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondents or others, including the American Gas Association." Finally, the subpoenas were modified so that additional protections were afforded to confidential information and the producers were accorded the option of producing records for inspection where they were stored.

B.

Because the producers have not cross-appealed, the issues before us relate solely to those limiting modifications fashioned by the District Court which were not subsequently accepted by the Trade Commission and the producers in their field stipulations. Those issues, in the order we will deal with them, are as follows:

1. Did the District Court *abuse its discretion* under the relevance standard of *United States* v. *Morton Salt Co.*,[5] in refusing to order the production of documents which did not relate to estimates of *proved* reserves? In other words, was the District Court's finding that documents related to *non*proved reserve estimates (*e.g.*, raw field data and bid files) were not "reasonably relevant" to the investigation described in the FTC's resolution of 3 June 1971 *a clearly erroneous finding?* (*a relevance issue—an essentially factual determination* for the District Court)[6]

2. Considering the purpose of the Power Commission's investigation and the FPC's previous factual determination that AGA proved reserve data was reasonably re-

[5] 338 U.S. 632 (1950).

[6] *FTC* v. *Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976). See text, *infra*, at note 39.

liable for ratemaking purposes,[7] would the effort and expense involved in producing documents so that the FTC could determine for itself the validity and accuracy of all natural gas reserve estimates (proved or unproved) have imposed an unfair and unreasonable burden on the producers? If so, did the District Court abuse its discretion in (1) limiting enforcement of the subpoenas to documents containing or underlying *proved* reserve estimates and (2) restricting use of the documents to an investigation of an alleged conspiracy in the reporting of natural gas proved reserve estimates? (a *burdensomeness issue*—a determination *within the sound discretion* of the District Court)

3. Was the District Court in error in refusing to permit the Trade Commission to use the documents called for by specifications G through I "to investigate or determine the amount of proved natural gas reserves," *i.e.*, in ordering this production "for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates. . . ."[8] (the *administrative collateral estoppel issue*—a *question of law* initially for the District Court)

4. Did the District Court *abuse its discretion* in:

a. limiting the production of documents called for under specifications G through I to a random sample of fields in which the producers "had an ownership interest as of the date reports were submitted by the Southern

[7] Opinion and Order Determining Just and Reasonable Rates for Natural Gas Produced in the Southern Louisiana Area (*So La II*), 46 F.P.C. 86, 115 (16 July 1971), *aff'd sub nom.*, *Placid Oil Co.* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom.*, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974).

[8] App. IV at 807a (¶ 2.d.).

Lousiana Subcommittee of the [AGA]" for the years 1969, 1970, and 1971? [9]

b. limiting the production of documents called for under specifications J and K to ". . . documents relating to . . . estimates . . . which were included in reports for 1971 by the Southern Louisiana Subcommittee of the [AGA]" and ". . . prepared or dated during the years 1966 through 1971, inclusive, [and] which were *exchanged between or among*, or constitute, contain or refer to any agreement, arrangement or communication between or among, [the producers] or others, including the [AGA]"? [10]

c. permitting documents to be produced for inspection at their *situs*? [11]

d. Attaching conditions to disclosure to insure *confidentiality*? [12]

e. allowing the producers ". . . *180 days* after the date upon which they are advised of the sample fields selected . . ." in which to comply with the subpoenas? [13]

5. Was the District Court in error, under the relevance standard of *United States* v. *Morton Salt Co.*,[14] in affording Superior Oil Co. differing treatment? [15] (*a relevance issue*—an *essentially factual determination* for the District Court).

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[9] *Id.* at 806a-07a (¶ 2.a.-c.) (emphasis added).

[10] *Id.* at 807a-08a (¶ 3) (emphasis added).

[11] *Id.* at 808a (¶ 7).

[12] *Id.* at 809a-10a (¶ 8).

[13] *Id.* at 808a (¶ 6).

[14] 338 U.S. 632 (1950).

[15] App. III at 469a-71a.

C.

Before embarking on our analysis of these issues we will briefly summarize the arguments of the parties. The producers have never quarreled with the power or the right of the Federal *Trade* Commission to investigate the natural gas industry to uncover violations of the antitrust laws or unfair trade practices. However, they do argue that there can be no possible reason for wanting documents that *do not relate* to proved reserve estimates simply because it is only *proved* reserve estimates that are taken into account by the Federal *Power* Commission in setting area rate ceilings and *it is only proved reserve estimates that are reported* to the AGA and then, through the AGA, to the public. Alternatively, the producers argue that the Federal Power Commission, the only agency possessing the requisite expertise, has determined that AGA proved reserve data are accurate. Therefore, the FTC is collaterally estopped from relitigating this one issue of fact.

The Trade Commission, on the other hand, points out that there is no provision in the Federal Trade Commission Act (FTCA) excepting gas producers from the coverage of the Act, as there is for banks and certain common carriers, and that therefore jurisdiction to investigate exists. They argue that such jurisdiction is broad, "reaching not only existing violations of . . . [the Sherman and Clayton Acts], but trade practices which conflict with their basic policies." [16] The Trade Commission goes on to argue that, as a factual matter, its investigation does not duplicate studies made by the Federal Power Commission and that, even if it did, collateral estoppel would be inapplicable because its purpose in determining the accuracy of reserve data is different

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[16] Brief for Appellant (filed 30 Aug. 1974) at 17-18.

from the Power Commission's purpose in determining accuracy.

Although the producers are correct in arguing that data relating to any reserves other than proved reserves would not be "reasonably relevant" [17] to the investigation defined by the Trade Commission's resolution of 3 June 1971 (and that this part of the District Court's order could properly be supported on relevance grounds alone), it is not clear from the transcript of the 13 December 1973 hearing whether the District Court reached the issue of relevance in regard to *all* documents subpoenaed. Since the Trade Commission had subpoenaed *all* reserve records so that it could determine independently the total gas reserves of the area, and since the Power Commission had already determined that the AGA figures were accurate, the court apparently was of the view that the Trade Commission was collateraly estopped from forcing the producers to relitigate this matter, and that therefore it was unnecessary to reach the issue of relevance for *all* documents. In any event, it seems clear that the District Court also felt that it would be unduly burdensome to permit yet another plenary investigation (for the third time in two years) of natural gas reserves.[18]

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[17] *United States* v. *Morton Salt Co.*, 338 U.S. at 652.

[18] In addition to *So La II*, on 23 February 1971 the Power Commission commenced work on the National Gas Reserves Study (NGRS), a massive audit of all United States gas reserves. In its final report, issued May 1973, the Commission concluded that AGA proved reserve estimates slightly *overstated* total reserves. FPC STAFF REPORT ON NATIONAL GAS RESERVE STUDY (May 1973) at 3, App. VI at 1048a. *See infra* at pp. 19-20.

Counting NGRS and *So La II*, the investigation contemplated by the Trade Commission's subpoenas would have been the third plenary investigation into the same gas reserve data, *i.e.*, proved reserve estimates in South Louisiana as of 31 December 1970. Since its NGRS report, the Power Commission has continued to monitor closely the accuracy of the AGA reports.

Thus, there are *three independent grounds* for affirming the District Court's most important limiting modifications:[19] relevance (issue 1 *supra*), burdensomeness (issue 2 *supra*), and administrative collateral estoppel (issue 3 *supra*). For the sake of clear analysis, we will attempt to keep these three grounds separate as we now proceed to a discussion of the issues.[20]

II. THE FEDERAL POWER COMMISSION INVESTIGATIONS

First, we turn to the District Court's determination that, for the years covered by the Trade Commission's subpoena, the Federal Power Commission had already (1) considered and ruled upon the validity and accuracy of natural gas reserve data, and (2) determined natural gas reserves.[21] The majority opinion implicitly agrees with this District Court finding, but some development of this point is necessary, as it forms the background of the whole case.

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[19] As we shall see, the two most important modifications made by the District Court—(1) limiting the production of documents to those containing or underlying *proved* reserves and (2) restricting the use of this information to an investigation of an alleged conspiracy in the reporting of proved reserves—can and should each be affirmed on two of these three grounds.

[20] Rule 18(a)(3), FED.R.CIV.P., provides that the Federal Rules of Civil Procedure ". . . apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . . ." We are thus bound by Rule 52(a), FED.R.CIV.P., which states that "[f]indings of fact shall not be set aside unless clearly erroneous . . . ."

[21] App. IV at 805a.

Although the Power Commission began area rate proceedings in 1961 for the Southern Louisiana area, it was not until 1968 that the Commission rendered a final decision, which in turn was modified in early 1969. Even before oral argument could be heard before the Fifth Circuit on petitions for review sought by producers, pipeline companies, and consumers, the FPC had instituted new proceedings (*So La II*) "to reconsider all major actions it had taken" in the prior proceedings.[22] As the

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[22] Southern Louisiana Area Rate Cases, 428 F.2d at 421.

This second proceeding was initially denominated the "Offshore Louisiana Area" proceeding to distinguish it from *So La I* (the "Louisiana Area" proceeding). The impetus for this proceeding was contained in the record of *So La I* where the FTC said:

> . . . the pleadings do lead us to the conclusion that the vital importance of future additional gas supply from the offshore areas in Southern Louisiana warrants the immediate commencement of the further proceeding we had contemplated in our original Opinion herein looking towards a possible revision of the area price ceilings for such gas.

41 F.P.C. at 307. The Court of Appeals for the Fifth Circuit expressly endorsed the FPC's new initiative commenting on "new evidence of a possible impending gas supply shortage" and leaving the proceeding open to explore this development. *See In re Southern Louisiana Area Rate Cases,* 444 F.2d 125, 126 (5th Cir. 1970). This new proceeding initially focused strictly on the offshore area, 41 F.P.C. at 307-08, but was later enlarged to include onshore Southern Louisiana, 42 F.P.C. 1110. The order officially beginning the record proceedings was entered on 20 March 1969. 41 F.P.C. 378. The FPC subsequently stayed the effectiveness of its *So La I* orders at the request of the Court of Appeals for the Fifth Circuit. 41 F.P.C. 675-76. This stay was continued on 15 December 1969. 42 F.P.C. 1110, 1111. When the Fifth Circuit issued its opinion in June 1970, it expressly left the *So La I* record open for "retrospective as well as prospective adjustments." 444 F.2d at 126-127. Since the FPC had never made its orders fully effective, it was legally and conceptually

FPC stated in its order instituting *So La II*, Phase I of its new proceeding solicited ". . . evidence with respect to the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence. . . ." [23]

The FPC was concerned in *So La II* with complaints that adequate supplies of natural gas were not being produced and would not be produced under the recently ordered area rate ceilings. More important for present purposes, the FPC during *So La II* was presented with the argument by Municipal Distributors Group (MDG), an intervenor which represented the interests of municipal and other publicly owned gas distribution systems, that the supply shortage was more apparent than real. It was argued that "the sharp decline in the supply picture in 1968-69 is revealed by the above record evidence to be caused . . . largely by revisions in the estimates" of proved reserves reported by the AGA.[24] Such a contention went to the heart of the Power Commission investigation. If it were true that the decline in reserves was a matter of definition and not of economics, the concern of the FPC that new area rates might be required to encourage production would be obviated.

In its final opinion in *So La II* the FPC discussed testimony which was used by MDG to impeach AGA data.

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logical for it to consolidate *So La I* with the new proceeding, and it did so on 24 December 1970, 44 F.P.C. 1638, in order to assess supply factors which it had ignored in *So La I.*

[23] Order Enlarging Investigation and Proposed Rulemaking Area Rate Proceeding (Southern Louisiana Area), 42 F.P.C. 1110, 1112 (15 December 1969).

[24] *See* MDG's Initial Brief in *So La II* at 15.

The testimony outlined several methods by which producers could withhold reserves from the AGA. Discussed also were MDG's arguments relating to discrepancies between figures gathered by the FPC and those submitted by the AGA. Additionally, the FPC referred in some detail to the testimony and exhibits supporting the reliability of AGA data.[25] As a result, it reached the following conclusions:

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[25] As part of its examination of the false shortage allegations, the FPC had conducted a spot audit of natural gas reserves requiring producers to report uncommitted reserves in the Southern Louisiana area. A composite of this data was admitted into evidence in *So La II* after the FPC had closely audited both the composite and the underlying individual responses of the producers. The data underlying the producers' uncommitted reserve estimates, (*e.g.*, electric and other technical logs, core analyses, formation tests, shut-in and flowing pressure tests, structure maps, isopachus maps, directional surveys, daily drilling records, etc.) was also thoroughly scrutinized by the FPC auditing team. *See* 43 F.P.C. 444-48 (1970). According to appellees, "In most of the analyses, the audit team derived independent factors for estimating reserve volumes and made its own reserve estimate based upon these independent factors." Supplemental Memorandum for Appellees Texaco Inc., Standard Oil Co. (Indiana), Shell Oil Co., Exxon Corp., and Mobil Oil Corp. (filed 13 April 1976) at 6. The FPC staff members in charge of the *So La II* audit concluded that APA reserve data was accurate and established ". . . beyond any doubt that . . . a serious gas supply shortage does in fact exist throughout the nation's gas supply areas, and in Southern Louisiana in particular." *Hearings on Concentration by Competing Raw Fuel Industries in the Energy Market and its Impact on Small Business* Before the Subcomm. on Special Small Business Problems of the House Select Comm. on Small Business (hereinafter *1971 House Concentration Hearings*), 92d Cong., 1st Sess. A43 (1971). Of the AGA data, the FPC staff also stated,

> Certain parties have questioned the reliability of the AGA data in these proceedings . . . . However, the record establishes the validity and reliability of the AGA and Form 15 data show similar trends of reserves and reserve-to-production (R/P) ratios. AGA data indicates a steady decline in the national R/P ratio from 19 in 1963 to 13 in 1969. Form 15 data indicates a similar decline in the national R/P ratio from 20 in 1963 to 14 in 1969. The American Gas Association reserve data is not impeached, in our opinion, in this discrepancy.[26]
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> • • • •
>
> For the reasons stated herein, we find the AGA reserve data is reasonably reliable for the purposes used herein. Accordingly, and because petitioner has not raised any new evidence, we deny the petition to reopen.[27]

In other words, *while in 1963 AGA data started with nineteen years of reserves and the Form 15 data started with twenty years of reserves, by 1969 each calculation had dropped 6 years of reserves off its proved reserve figure, so the two calculations were comparable.* Other substantial corroborating evidence, including the fact and extent of pipeline curtailments of gas service, was re-

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> reported AGA reserves data beyond any reasonable doubt.

Id. at A56. *See also id.* at A72.

[26] Opinion and Order Determining Just and Reasonable Rates for Natural Gas Produced in the Southern Louisiana Area, 46 F.P.C. 86, 113 (16 July 1971) *aff'd sub nom., Placid Oil Co.* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974). In affirming, the Supreme Court expressly approved the FPC's reliance on the non-cost factor of supply and noted that both the Commission and the Fifth Circuit were working ". . . against the background of a serious and growing domestic gas shortage. . . ." 417 U.S. at 320.

[27] *Id.* at 116.

ceived and considered by the FPC during *So La II*."[28] Thus, AGA data was shown to be reliable.

The underreporting issue was again raised on review before the Fifth Circuit and received the following extensive rebuttal in a footnote:

> . . . Standing virtually alone against the National (and record) judgment of a near energy calamity, the American Public Gas Association (APGA) contends that the current critical shortage of natural gas is but a pretextual "cry of wolf" calculated to mislead FPC into establishing artifically high rates in the producers' behalf. APGA would have us believe that the energy crisis is a mirage—indeed, a hoax! APGA claims that "there appear to be adequate supplies of gas in the domestic United States to satisfy the projected demands of U.S. consumers well into the 21st Century." APGA Supp. Brf. at 5 n. 9. But to talk of "Supplies" of gas is a misleading oversimplification. Obviously, the gas is not presently available. At most, if there is appropriate exploration, the demonstrable reserves may be exploited to meet the needs. Given a system which depends on private stewardship and marshalling of natural resources, there is a supply shortage if the producers do not produce. FPC has the statutory duty, not only to guard the consumers against super-profits reaped from artificially inflated rates, but also to protect consumer interests by making sure that the rate schedule is high enough to elicit an adequate supply. It is a delicate balancing test. FPC must fix its course to attain the utopian "optimum" rate schedule. Given the current shortage of available supply FPC must swing the pendulum towards the incentive, supply-eliciting side of rates. And so it has done.[29]

[28] *See* 46 F.P.C. at 113.

[29] *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 894 n. 13 (5th Cir. 1973), *aff'd sub nom., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974).

In addition to the examination undertaken in relation to the *So La II* proceedings, the Power Commission undertook in early 1971, at the direction of Congress, a National Gas Survey, a portion of which was the National Gas Reserves Study (NGRS). *The NGRS was a completely independent survey of reserves and did not rely on AGA figures at any point.* However, in the final staff report of the NGRS (issued May 1973) a comparison was made with AGA figures:

> The NGRS estimate is lower than the estimate by A.G.A.; however, the difference is less than 10 percent. The difference of 23.5 Tcf between the estimate of the non-associated and associated gas reserves for the 6,358 entries in the reported fields category (a) is the primary difference between the total estimates. The gas reserves in the "A.G.A. omitted fields" are a relatively insignificant part in the total NGRS estimate, and it seems evident that the 62 entries in the "omitted" category (b) are small fields. The two dissolved gas estimates differ by 1.7 Tcf or by about 5 percent."[30]

Thus, this independent study concluded that, if anything, AGA proved reserve estimates overstated the true picture.

In these Power Commission investigations the FPC necessarily analyzed and checked the AGA reserve data in *So La I* and *So La II*, the FPC considered the data offered by the Municipal Distributors Group to impeach the AGA data and found that this data (derived from the regular Form 15 reports) confirmed rather than contradicted the AGA data, all of which was reviewed by the Fifth Circuit and the Supreme Court. Then separately and in addition to the above, the Power Commission made, in 1971-73 at the request of Congress, a completely independent analysis, not relying on AGA data in any way,

[30] FPC STAFF REPORT ON NATIONAL GAS RESERVE STUDY (May 1973) at 3, App. VI at 1048a.

called the National Gas Reserves Study, which concluded that proved gas reserves were actually somewhat *less* than calculations based on the AGA figures showed.

While the analyses of the FPC in the *So La I* and *So La II* proceedings were made for ratemaking purposes, the National Gas Reserves Study was not. And in both instances the Power Commission made findings of fact on the precise issue (accuracy of *reported* reserves) which the Trade Commission now seeks to relitigate. Hence the District Court made the factual determination that the Power Commission had already (1) considered and ruled upon the validity and accuracy of natural gas reserve estimates and (2) determined natural gas reserves. The District Court's finding of fact should not be confused with the *question of law* which necessarily followed, whether it was appropriate to give this finding of fact collateral estoppel effect, which we explore in section VI, *infra*.

III. Court Enforcement of Administrative Subpoenas

A. *Court Enforcement of Administrative Subpoenas*

The Trade Commission and a majority of this court apparently would have us proceed as if there were on appeal here an order of the Trade Commission, entitled to deference as an exercise of that agency's expertise.

To the contrary, this is an appeal from orders of the District Court enforcing the Commission's subpoena with some limiting modifications. Accordingly, it is not the views of the Commission staff which must be accorded deference, but the determinations of the District Court which must be upheld unless clearly erroneous or an abuse of discretion.

There are limits to the subpoena power of an administrative agency, and the duty and authority to enforce

those limits rests in our federal district courts. As the Ninth Circuit has stated,

> There is no rule requiring a court to act against conscience. The proceeding [judicial enforcement of administrative subpoenas] is equitable in character. Equitable considerations should prevail. There is no power to compel a court to rubberstamp action of an administrative agency simply because the latter demands such action.[31]

By arguing as if it had been denied the ability to proceed with its investigation, and by arguing that its subpoena must be enforced unless "the evidence sought is plainly irrelevant to any purpose within [its] statutory authority . . . ," [32] the Trade Commission demonstrates that its real purpose is to strip the federal judiciary of any discretion in subpoena enforcement proceedings. Ironically, the District Court's order here *enforces* the FTC's subpoena as to the great preponderance of the documents sought, and even specifically preserves the FTC's ability to obtain further documents and information.[33] Consequently, the majority's failure to sustain the District Court in its reasonable limitations of the FTC's subpoena may have exactly the precedential effect desired by the Trade Commission. By stripping the District Court, which has reviewed countless submissions and has held two full days of hearings, of any discretion in enforcing this FTC subpoena, our colleagues have

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[31] *Chapman* v. *Maren Elwood College*, 225 F.2d 230, 234 (9th Cir. 1955); *accord*, *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir. 1945).

[32] Supplemental Brief for Appellant on Rehearing *En Banc* (filed 31 Mar. 1976) at 5 (emphasis added).

[33] *See* the last paragraph of both District Court Orders, App. III at 471a & IV at 810a.

totally undermined the concept of *judicial* enforcement of administrative subpoenas.

The Supreme Court has announced repeatedly the principles which should guide a district court in deciding the lawfulness of investigative subpoenas issued by administrative agencies:

> The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. . . .
>
> [T]he requirement of reasonableness . . . comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, . . . this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry.[34]
>
> • • • •
>
> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.[35]

More specifically, in *United States* v. *Morton Salt Co.*, in the context of a Trade Commission investigatory proceeding, the Supreme Court wrote,

> Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority

[34] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-09 (1946).

[35] *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967).

> of the agency, the demand is not too indefinite and the information sought is *reasonably relevant.*[36]

In addition, the Court has made clear that these "issues of . . . relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters." [37] They are, instead, matters which require the exercise of sound discretion on the part of a district court and matters which raise questions essentially factual in nature. Accordingly, we, at the appellate level, must defer to the determinations of the District Court unless we find those determinations *clearly erroneous* or *an abuse of discretion.*[38]

In a recent opinion affirming the order of a district court enforcing another Trade Commission subpoena, this

[36] *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) (emphasis added). The majority correctly decides that this is the applicable standard. Court's opinion note 23 & accompanying text. Previously, however, in its "II. Court Enforcement of Administrative Subpoenas—The Applicable Legal Principles," the majority also relied upon *Endicott Johnson Corp* v. *Perkins*, 317 U.S. 501 (1943), and *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). As we demonstrate in Part VI-A, *infra*, pp. 73-76, these two cases deal with the agency's *jurisdiction* under their basic statutes, on which judicial review may logically be postponed until the administrative proceeding is completed, while here we deal with issues of relevance, burdensomeness, and collateral estoppel, which if not decided at the outset may become, in effect, moot by the time the companies have gone to the time and expense of baring their confidential files. *See Safir* v. *Gibson*, note 131, *infra*.

[37] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 217 n.57.

[38] *See United States* v. *Nixon*, 418 U.S. 683, 702 (1974):

> Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues.

court correctly stated the standard of appellate review applicable to a district court's determinations of relevance:

> A finding by the district court that documents are relevant and necessary to an inquiry by the FTC is *essentially factual in nature* and cannot be overturned unless the district court's finding is *clearly erroneous.*[39]

We point out in Part IV.A., *infra*, how the majority has ignored and evaded this established standard—and any other *appellate* standard—of judicial review. Similarly, in *NLRB* v. *Northern Trust Co.*, the Seventh Circuit has written,

> We agree that the courts are not mere rubber stamps and that subpoenas are in *the District Court's discretion*, but we fail to see how that helps appellants. It seems to us to have the opposite effect, for here the court after a very thorough and careful inquiry granted the Board's request for enforcement. Thus appellants are in the unenviable position of sustaining the great burden of showing *an abuse of discretion.* They have failed to do so. The facts of the case insofar as the Board knew them at the time of the application and the materiality of the evidence sought were brought out before the trial judge, who concluded that the documents which the Board wanted to be produced were *relevant.* We are not willing to disturb his holding, because we do not think any *abuse of discretion* was involved.[40]

Thus, we are left to decide in the instant case whether the District Court abused its discretion, under the reasonably relevant standard of *United States* v. *Morton*

[39] *FTC* v. *Lonning*, 539 F.2d 202, 210 n.14 (emphasis supplied).

[40] 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945) (emphasis added); *accord*, *Lynn* v. *Biderman*, 536 F.2d 820, 824 & 826 (9th Cir. 1976).

Salt Co., by refusing to enforce those portions of the subpoenas that called for documents which did not relate to estimates of proved reserves. In other words, was the District Court's finding that only documents related to proved reserves were "reasonably relevant" to the FTC's investigation a clearly erroneous finding? We conclude that it was not and that the District Court acted well within the bounds of its discretion.

IV. Relevance

A. *Purpose of Inquiry, Test of Relevancy, and Standard of Judicial Review*

The requirement that documents sought by an agency must be *"reasonably relevant"* to a lawful investigative *purpose* constitutes the fundamental limitation on administrative subpoena power. The most astonishing point about the majority opinion's discussion of "relevance" is that nowhere therein does it define the FTC's "purpose" in the investigation, nor does it purport to employ a standard of appellate review which is legally definable.

"Relevance" simply cannot be determined in the absence of defined "purpose," whether that purpose be as sharply defined as in a criminal trial, less precisely delineated as in a civil proceeding, or more generally defined as in a grand jury inquiry or in an administrative agency investigation as here.[41] In all situations, purpose in some degree must be defined in order that notice be given and relevance thereafter may be assessed.

[41] The fact that a subpoena is issued in an investigative setting does not diminish this requirement; respondents to any administrative subpoena may object on grounds of relevance. *See United States* v. *Associated Merchandising Corp.*, 261 F.Supp. 553, 560 (S.D.N.Y. 1966) ("It is clear, even in the investigative cases, that respondents may object to the subpoena on the ground of relevance and upon the ground of oppressiveness, *i.e.*, the undue burden of compliance.")

This is the reason for the Administrative Procedure Act requirement [42] that an agency state the purpose of its proposed investigation at the very outset, to give notice to objects of the investigation and all other interested parties, and to set a standard by which the relevance of the agency's demands for tangible evidence and testimony, as well as other actions, may be judged. Without such a requirement for a defined and announced purpose the Federal Trade Commission—or any other of our regulatory agencies—would speedily metamorphosize into the "Roving Commission." In seeking to ascertain the actual purpose of the FTC's investigation, the District Court here understandably looked beyond the FTC's authorizing resolution, for, as written, this broad resolution could have authorized a subpoena covering virtually any information relating to appellees' oil and gas business. And the majority here never came any closer to defining the purpose and scope of the FTC inquiry than this.

Where the agency's statement of purpose is not sufficient to permit a relevance determination, the courts may refuse enforcement.[43] Or, even if the statement is somewhat obscure, the court may seek to clarify and determine for itself the agency's actual purpose, as the District Court did here.[44] As written, the resolution

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[42] 5 U.S.C. § 554(b) (1970).

[43] *Montship Lines, Ltd.* v. *Federal Maritime Bd.*, 295 F.2d 147, 154-55 (D.C. Cir. 1961); *Hellenic Lines, Ltd.* v. *Federal Maritime Bd.*, 295 F.2d 138, 140 (D.C. Cir. 1961); *FTC* v. *Green*, 252 F.Supp. 153 (S.D.N.Y. 1966).

[44] During the hearing of 13 December 1973 the following exchange took place between Judge Hart and FTC counsel, Gerald Harwood:

> THE COURT: Wait a minute. You are trying to prove that they conspired together to make certain returns with regard to reserves that were incorrect, aren't you? Is that what you are trying to say?
>
> [Continued]

certainly furnished no meaningful criteria for measuring the relevance of the data sought.[45] Forced to seek clarification from other sources the District Court asked Trade Commission counsel to define the purpose of the Agency's investigation. He responded as follows:

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[44] [Continued]

> MR. HARWOOD: That was one of the subjects we are investigating, yes.
>
> THE COURT: What else are you investigating?
>
> MR. HARWOOD: Your Honor, the resolution states that we are engaged—
>
> THE COURT: Don't tell me what the resolution says. Tell me what you are trying to do. I don't understand the resolution.

App. II at 399a-400a.

[45] When, as here, the District Court decides not to refuse enforcement because of an insufficient statement of purpose, the court must determine for itself the agency's actual purpose. In making this essentially factual determination the District Court may look to the agency's statement of purpose (here the FTC's authorizing resolution quoted in majority opinion at p. 8) and any other relevant evidence, but neither the District Court nor this court may rely on its own or counsel's post hoc rationalizations. As the Supreme Court explained in *Burlington Truck Lines, Inc.* v. *United States*,

> The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; [*SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> > "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ." *Ibid.*
>
> For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with

> [FTC COUNSEL]: . . . [W]hat we are investigating is possible collusive conduct by the natural gas producers in the reporting of these reserves.
> . . . .
> [FTC COUNSEL]: . . . What we want to find out is whether or not in reporting natural gas reserves there has been collusive conduct in the way these estimates are prepared.
> THE COURT: Reporting them to whom.
> [FTC COUNSEL]: All right. Reporting them to the American Gas Association, because the American Gas Association data is the only available published data on these reserves.[46]

In addition, the FTC previously had made the following significant representation to Congress:

> The subpoena [issued on 24 November 1973] focused on Offshore South Louisiana and *revolved around one central premise* which is that natural gas producers, for a variety of reasons, make estimates of *proven* gas reserves. . . .
>
> The theory of the investigation is *to compare the reserve estimates used by the companies in their internal purposes with the estimates submitted to the American Gas Association* that were relied on by the Federal Power Commission. In other words the investigation was *not attempting to make new estimates of the proved reserves* in South Louisiana but was instead attempting to get at reserve estimates already prepared.[47]

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the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197), the administrative process, for the purpose of the rule is to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U.S., at 196.

371 U.S. 156, 168-69 (1962).

[46] Transcript of the 13 Dec. 1973 Hearing, App. II at 352a & 360a.

It seems clear from these sources that the central purpose of the FTC investigation was to compare *proved* reserve estimates *kept* by the companies with the *proved* reserve estimates *reported* to the AGA. Moreover, since only *proved* reserves are reported to the AGA and since AGA data is the only published reserve data available, it followed that speculative estimates of possible, potential, or other unproved reserves (*e.g.*, the reserve estimates typically found in raw field data or bid files) could have no relevance to the FTC's investigation into whether in the *reporting* of natural gas reserves there had been collusive conduct in the way these proved reserve figures were prepared.

The District Court was clearly of this opinion, and because this factual determination was well-founded in both logic and evidence, we do not understand how a majority of this court could find it to be *clearly erroneous*. Likewise, we do not understand how the District Court could have *abused its discretion* in limiting enforcement of the subpoenas to documents containing or underlying *proved* reserve estimates. By the Trade Commission's own admissions, before the District Court, in briefs to the court,[48] and in representations to Congress, these were the only documents relevant to the Trade Commission's investigation.[49]

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[47] Response to Senator Hart—FTC Investigation of Reporting of Natural Gas Reserves, June 1973, App. IX at 1690a-91a (emphasis added). *See also* Statement of James T. Helverson, Director, Bureau of Competition, FTC, Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 27 June 1973, App. IX at 1738a-39a.

[48] *See* note 171 *infra*.

[49] As recently as 28 July 1975, in a letter to Senator Hart from then-Chairman Engman, the FTC has reconfirmed that

the purpose of its investigation is "to determine whether *proved* gas reserves have been *underreported*, either by collusion or by individual action." Memorandum in Support of Supplemental Opposition by Appellant, FTC, to Motion by Appellee, Superior Oil Co., for Permission to File Supplemental Memorandum (filed 1 Aug. 1975) (Attachment).

One regrettable obfuscation of what the FTC is seeking and what is relevant to the investigation's purpose is repeated in the majority opinion. It refers to "all reserve estimates made by the producers, both for various internal business purposes and for reports to the AGA." Maj. Op. at 20. The same false distinction is made at p. 9, ". . . comparison of the various estimates used by producers in their internal procedures and business operations with those reported as proved estimates to the AGA"; and again at p. 23, ". . . to compare estimates prepared for various business purposes with those reported to the AGA." The implication appears that the producers keep two sets of books, for their own use and for reporting to AGA. The proved reserve figures are prepared for "internal business purposes" just as much as any other calculations; more so, in fact, for without them no gas company could accurately manage its business, and proved reserve calculations were made long before AGA existed. These proved reserve figures are now reported to AGA, and they are the only figures ever so reported. The other calculations are various preliminary estimated reserves, derived in different companies from different assemblages of scientific data, and not commonly defined. These, too, are prepared for "internal business purposes," just as are proved reserve calculations, but at a much earlier stage in the gas exploration or prospecting process. These are *never* reported to AGA, *because they are abandoned for internal business purposes* as soon as "proved reserve" figures become available for each individual tract.

The lack of understanding of the FTC as to the total *non*-relationship of these preliminary estimates to proved reserves, which alone are reported, and the resulting total *ir*relevancy of these preliminary estimates to any purpose of the FTC in investigating false or collusive reporting, are discussed in Part B. *infra*. The immediate point here is to make clear that *all* producer reserve data is prepared for internal business purposes, though only proved reserve data is reported to AGA.

[Continued]

Of course, the majority does not determine the District Court's finding to be "clearly erroneous," nor did it find an "abuse of discretion." By these accepted tests the trial court action could not possibly be upset. What the majority does do is to brush aside the accepted legal standards of appellate review. In so doing it wriggles and twists to avoid applying the proper standard of judicial review by claiming "[h]ere, however, the district court's relevance determinations rested upon—and, indeed, were inseparable from—its view of the applicable law with respect to the proper scope of the FTC's investigation." [50] After the factual inquiry made by the District Court of FTC counsel, after the FTC's representations to Congress, it is clear that the trial court's determination of the purpose of the FTC investigation was made as a factual matter, not a legal determination. ("Tell me what you are trying to do. I don't understand the resolution.")[51] The FTC resolution, the FTC counsel's answers to questions, the FTC statements to Congress (notes 47 and 49, *supra*), all are evidentiary *facts* as to the Commission's stated purpose of its inquiry.

A most basic flaw in the majority's analysis concerns their characterization of this inquiry by the trial court into the purpose of the FTC's investigation. A close

[49] [Continued]

The subpoenas, as modified by the District Court and the stipulations, cover every document which relates to proved reserve data. As is apparent from the purpose of the FTC investigation, discussed above, the modified subpoenas will cause the production by the companies of every document, prepared for any purpose, relating to proved reserves. The subpoenas will not cause the production of documents concerning data unrelated to proved reserves and therefore never reported to the AGA, as such material is irrelevant to the FTC inquiry purpose.

[50] Maj. Op. 25, n. 29.

[51] Note 44, *supra*.

examination of this characterization is in order, since the majority relies on the characterization as the foundation for its belief that it should completely substitute its judgment for that of the District Court in this case. The majority states that the District Court's "relevance determinations rested upon—and, indeed, were inseparable from—*its view of the applicable law* with respect to the proper scope of the FTC's investigation." [52] At another point the majority emphasizes that the trial court used "its *own* conception of the proper scope of the FTC's investigation" [53] in making its decisions as to relevance. In other words, the majority believes that the District Court *imposed* on the parties its own view of the proper scope of the investigation and, in effect, decided that the FTCA allowed the FTC to investigate only proved reserves of natural gas.

The majority is clearly wrong in its artificial attempt to cast the actions of the trial court as a determination of law. Rather, the trial judge conducted a factual inquiry in order to determine what, in actuality, the FTC was attempting to do in this case. Indeed, at the hearing on 13 December 1973, the District Court, in making its relevance determination as to the bid files, stated that the files were not relevant "to the investigation or inquiry that *you* tell *me* you are making. . . ." [54] The trial court recognized that the breadth of the investigation was primarily for the investigators (the FTC) to determine; in this case, the court was merely trying to develop the necessary factual foundation to make a ruling on relevance. The District Court was clearly not trying to *mold* the scope of the investigation, but rather to define it; this was not an imposition of the court's view but an inquiry made of those conducting the investigation. In making

[52] Maj. Op. 25, n.29 (emphasis added).

[53] *Id.* at 43 (emphasis added). *See also id.* at 31.

[54] Transcript of 13 Dec. 1973 Hearing, App. II at 431a (emphasis added).

its relevance determinations the trial court proceeded on the basis of the FTC counsel's representations to the court and not on its own view of the FTC's statutory authority in this area.

Not only does the majority repeatedly offer an inaccurate characterization of the trial court's factual inquiry into the FTC's purpose, but they further confuse the issue by failing to be consistent even in their own misconceptions. The majority at one point assert that the trial court's erroneous definition of purpose resulted from its acceptance of the gas producer's concept of purpose in this case.[55] The majority thus switches its position, at various points asserting that the District Court high-handedly shaped the investigation according to its own view of the law, and at another stating that the court totally accepted the view of the private parties in this case. Which is it? Imposition or total acceptance? The truth is that neither characterization is accurate; rather, the trial court conducted a factual inquiry directed to the FTC in order to lay the analytical foundation for the relevance determinations. There is such a basic difference between *shaping* an inquiry and *defining* it; the sequence of events as revealed in the record in this case simply does not lend itself to inclusion in the former category.

Nor is there any place in the record where the District Judge "speculate[d] about the possible charges that might be included in a future complaint, and then . . . determine[d] the relevance of the subpoena requests by reference to those hypothetical charges." [56] Quite to the contrary, the District Judge acted on the basis that "[t]he relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's

[55] Maj. Op. 22 & 31.

[56] Maj. Op. 22.

investigation, as set forth in the Commission's resolution" [57]—the standard as defined by the majority, supplemented by factual inquiries of FTC counsel and FTC statements to Congress.

The majority's mistaken speculation that the District Court equated its definition of purpose with "a particular theory of violation" [58] is grossly deficient in several respects. First, there is no evidence that the trial court required a "narrowly focused theory of a *possible* future case"[59] as the only acceptable definition of purpose. Indeed, the District Court did not require it; we in the dissent do not suggest it; the precedents do not mention it; and logic, reason, and clear thinking do not dictate such a narrow focus. What the District Court, we in the dissent, the precedents, and logic *do* suggest is that *some* refinement of the FTC's extraordinarily broad investigatory resolution is in order. What the majority has done in suggesting that "a particular theory of violation" is the only acceptable refinement of purpose is to set up a straw man against which to argue its case for complete substitution of judgment on factual matters. Straw men are easy to knock down; it is far more difficult to provide a response to the eminently sensible proposition that some refinement of purpose is needed if the court is to have any role in considering the rights of *all* the parties who stand before it in a subpoena enforcement proceeding.

Returning to the question of the proper standard of review of the trial court's relevance determination, after the majority rejected the "clearly erroneous" and "abuse of discretion" standards, what standard did the majority set for itself? *The standard is substitution of judg-*

[57] *Id.*

[58] Maj. Op. 28.

[59] Maj. Op. 21 (emphasis in original).

ment—about that there is no doubt or disagreement. The truly novel element of this substitution standard is the justification put forth by the majority for its use in this case. The majority states that it has substituted its judgment here because "the [relevance] determinations of the trial court were dependent on, and integrally related to, a *legal* premise." [60] The majority does not venture beyond this conclusory statement in defense or explanation of its standard of review. In what way are the determinations as to purpose related to the legal premise so as to justify this standard of review? Are *all* fact determinations made in pursuit of a relevance determination (the "legal premise") subject to being disregarded under the substitution standard? What is the relationship between law and fact in this case which calls for the appellate court to substitute its view for that of a United States district judge? These are but a few of the vital questions left unanswered by the majority in this case.

The majority concedes that "[w]hen relevance determinations are, in essence, factual judgments, they are normally entitled to special deference from appellate courts. . . ." [61] As noted previously, the majority has attempted to cast the actions of the trial judge as determinations of law by inaccurately characterizing the events in the District Court. Once this false characterization is stripped away, we are left with a factual determination of purpose made by the District Court. *How was this factual determination "clearly erroneous"? The majority dare not make this claim, for it was the FTC which provided the facts for the trial court's finding related to purpose.* And if it is not clearly erroneous, we must accept it; if we must accept it, the modifications fashioned by the District Court in the name of relevance

[60] *Id.* at 25 n.29 (emphasis in original).

[61] *Id.*

must be seen as sensible. And, further, when the majority's straw man who advocates "a particular theory of violation" [62] as the only acceptable statement of purpose is removed from the scene (and this straw man is the only advocate of such a narrow focus), the scope of the District Court's refinement of the FTC's purpose emerges as a moderate and sound method to accommodate the rights of all the parties to this case.

We are well aware that the distinction between questions of law and questions of fact is often an elusive one. We have, however, shown that the District Court's inquiry into the purpose of the FTC's investigation was essentially of a factual nature—to elicit from the FTC information (facts) relating to the purpose for investigating the gas industry at this time. The majority believes it is sufficient to say that the relevance determinations involved a "legal premise" and thus are subject to a substitution of judgment. But they have not told us *why* this is a question of law; instead, the label "legal premise" is supposed to be taken as a sufficient basis for the appellate court's usurpation of the trial court's fact-finding role. The failure to explain the circumstances under which the mere existence of a "legal premise" can trigger de novo review in the appellate court is most disturbing. By failing so to explain, the majority has established a standard which can be employed by the simple unexplained step of denominating a trial court's decision as resting on a "legal premise." All litigation is premised on the law; until we have further clarification and analysis of this point from the majority, this standardless form of review can be imposed whenever more than half of the judges sitting on a case decide that they want to substitute their own preferences for the careful hearings of the trial judge.

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[62] *Id.* at 28.

The majority have correctly observed that there is a "limited role assigned to the federal courts in [subpoena] enforcement proceedings." [63] We fail to see how this observation can be reconciled with the complete substitution of judgment which the majority undertakes in this case. The directionless, standardless review employed by the majority in order somehow to vindicate a "legal premise" does no credit to an appellate tribunal.

B. *Raw Field Data, Bid Calculation Data, and Bid Calculation Files*

We now narrow our focus to two particular categories of documents which the District Court held need not be produced: (1) "[r]aw field data" and (2) "bid calculation data and bid calculation files." [64] We shall first try to clarify what remains in dispute after the stipulations and then analyze the principal controversy remaining.

As to the first category of documents there appears to be no further controversy between the parties—all parties having agreed that "[t]he Order may be affirmed insofar as it excludes raw field data, subject to the FTC's right to seek access to or production of such data pursuant to paragraph 9 of said Order. . . ." [65] The FTC and pro-

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[63] *Id.* at 4. *See also id.* at 16.

[64] Six-Company Order, App. IV at 860(a) (¶ 2.(a)).

[65] Six-Company Stipulation at 5. Even though the FTC and Superior were "unable to agree on any modifications of the district court's order of March 22, 1974, concerning Superior which would eliminate or narrow the issues remaining for decision by this Court . . ." (Superior Stipulation at 1), the FTC did offer to Superior the following modification, among others, as a basis for settling their dispute: "Specification G may be modified to require Superior to produce only documents containing *proved* natural gas reserve estimates." FTC's Statement of Issues and Proposed Modifications re Superior (filed 19 May 1976) at 3 (emphasis added). In light of this offer (which is less demanding than the District Court's Six-

ducers other than Superior also agreed that "[t]he Order may be modified to expressly exclude maps or other documents relating to the suspected location of natural gas in

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Company Order in that it would not require Superior to produce data *underlying* its proved reserve estimates), it also seems quite safe to assume (as the majority apparently does) (*see* Court's opinion note 64 & accompanying text) that the Trade Commission is no longer interested in Superior's raw field data.

One of the most puzzling and totally unexplained aspects of this case is why the FTC would make this eminently sensible and logical modification offer to Superior, but not to the other six appellees. Perhaps it is because the FTC and the other producers agreed not only that the District Court's ". . . Order may be affirmed insofar as it excludes raw field data . . .," but also because they agreed that "[t]he Order may be modified to expressly exclude maps or other documents relating to the suspected location of natural gas in currently unleased acreage." Depending on what is and what it not included under the term "raw field data," these two stipulations, when read together with the proviso agreed to by all the parties for paragraph 2.(a) of the Six-Company Order, *could be interpreted to require appellees to produce only those documents containing proved natural gas reserve estimates*, at least for "currently unleased acreage." This would at least partially explain why the FTC did not bother to make the same "proved reserve" modification offer to the other six appellees as it did to Superior.

Under specification G the FTC seeks, *inter alia*,

> documents containing estimates or evaluations including re-estimates or reevaluations made in connection with or in preparation for or as the result of the following: (1) bidding on or nominating leases (2) deciding whether to erect permanent platforms (3) compiling or inventorying total company reserves or supply (4) negotiating or contracting for the sale of natural gas, or for the joint or common exploration, development, production, purchase or sale of acreage, or for obtaining bank loans (5) filing depreciation expense schedules with Internal Revenue Service or (6) submitting field-by-field estimates

currently unleased acreage." [66] This second stipulation agreeing to exclude such documents pertaining to "currently unleased acreage" seems to eliminate any controversy between the parties over "bid calculation data" or "bid calculation files" (hereinafter referred to collectively as "bid files") [67] relating to acreage *not* currently leased by one of the appellees.

> to subcommittees or committees of the American Gas Association or the American Petroleum Institute.

FTC Subpoena, App. I at 54a. The stipulations filed by the parties do not indicate which or what portion of these categories of documents can be characterized as "raw field data." Paragraph 2.(a) of the Six-Company Order reads as follows:

> *Provided that*, to the extent otherwise called for, *any and all proved reserve data contained in bid calculation files* and relating to tracts covered by subparagraph 2(c) [*i.e.*, fields in which the respondent had an ownership interest as of the date reports were submitted by the Southern Louisiana Subcommittee of the AGA Committee on Natural Gas Reserves (FTC Subpoena, ¶ 2(c)) or fields in which an employee of such respondent had reporting responsibility to this Subcommittee (Six-Company Stipulation at 3)] *shall be produced.*

Six-Company Stipulation at 2 (emphasis supplied).

[66] Superior Stipulation at 1.

[67] Bid files are merely collections of documents developed for, and used in, nominating and bidding for the right to lease tracts for oil and gas exploration (here limited to Offshore Louisiana). They contain only data assembled *prior* to ownership of a tract. Such files consist of:

> (1) Speculative reserve estimates (based not on drilling, but on highly speculative tests such as measurement of deviations in the earth's magnetic and gravitational fields);
>
> (2) Backup data for such estimates, consisting of raw geological and geophysical data and interpretations thereof; and

[Continued]

Unfortunately, as to bid files relating to acreage that is currently leased or owned by one of the appellees, and to the extent that these files contain information other than "raw field data," a controversy still exists—perhaps the major controversy in this case. These bid files, which would be liable to disclosure under specifications G, H, and I of the FTC's subpoena (as modified by the "raw field data" and "treasure map" stipulations *supra*), include information which producers assemble in advance of a lease bid. The information is based upon limited geophysical information and almost never upon actual exploration. The producers consider the models they have developed for making lease bids the most valuable trade secrets they own, because of the large outlays which have gone into their development and the ease with which any producer could be outbid on leases if its competitors had access to the model.[68] Understandably, the producers argue strongly against disclosure of their bid files, since, according to them, the data contained therein would give a competitor easy access to their bid model.

Most important to the legal issues herein, they also assert that bid files are not relevant to any calculation of

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[67] [Continued]

(3) Documents reflecting the methodology employed by Appellees in developing bids.

Supplemental Memorandum for Appellees Texaco, Inc., Standard Oil Co. (Indiana), Shell Oil Co., Exxon Corp., and Mobil Oil Corp. (filed 13 April 1976) at 35. *Accord*, Affidavit of H. R. Hirsch at 4-7, appended to Brief of Appellee, Mobil Oil Corp. (filed 8 Nov. 1974).

[68] Mobil Oil Co. refers in its brief to "the all too frequent cases in which such information has been stolen and sold for large sums of money. *See, e.g., Tlapek* v. *Chevron Oil Co.*, 407 F.2d 1129 (8th Cir. 1969); *Abbott* v. *United States*, 239 F.2d 310 (5th Cir. 1956); *Hunter* v. *Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952); *Ohio Oil Co.* v. *Sharp*, 135 F.2d 303 (10th Cir. 1943)." Brief for Appellee, Mobil Oil Corp. (filed 8 Nov. 1974) at 27.

proved reserves, because these files only contain speculative estimates of producing capacity based on limited information. Once a producer obtains a lease and thus is able to drill exploratory wells, these bid estimates are no longer used by any company (except presumably to improve its bidding model or to analyze the bidding behavior of opponents). As a result, the producers contend that bid files could not be relevant to an investigation of conspiratorial and other practices aimed at underreporting proved reserves.

Bid files rarely, if ever, contain proved reserve estimates.[69] However, if they do, all appellees except Superior have agreed to produce any proved reserve data contained in their bid files.[70]

The Trade Commission, on the other hand, argues that "[t]he 'bid files' contain estimates of reserves, no matter how speculative or untested, and, as such, are plainly relevant to the analysis of gas reserve reporting which is part of the Commission's investigation." [71] How unproved reserve estimates, *which are never reported*, can be ". . . plainly relevant to the [FTC's] analysis of gas reserve *reporting* . . . ," (emphasis added) we leave to our colleagues to explain.

Our reading of the transcript of 13 December 1973 indicates that the District Court denied production of appellees' bid files on the theory that they were irrelevant to any type of investigation of reserve reporting. After probing FTC counsel to ascertain whether the FTC had any theories of possible relevance, the court stated,

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[69] *See* Affidavit of H. R. Hirsch at 9-11, appended to Brief for Appellee, Mobil Oil Corp. (filed 8 Nov. 1974).

[70] Six-Company Stipulation at 2.

[71] Reply Brief for Appellant (filed 23 Dec. 1974) at 9-10 (footnote omitted).

> . . . I hold that the bid files, the estimated unproved and unverified estimates, represented by the bid files are in no way relevant to the investigation or inquiry that you tell me you are making, with one exception.
>
> If you can later come back to me with a situation where a company has been awarded a bid on a property and has delayed an unreasonable time in drilling on it so they could come up with a proper estimate, then you may apply and I will consider giving you the bid file on that particular one.[72]

Since issuance of the District Court's orders, the Trade Commission has implicitly conceded the irrelevance of producers' bid files on at least two occasions. *First*, in *FTC* v. *Continental Oil Co.*,[73] one of the cases originally consolidated herewith, the FTC initially appealed, but subsequently moved for dismissal, explaining that FTC representatives had held further discussions and negotiations with Continental, that Continental had agreed to submit "further testimony relating to their production in compliance with the FTC's subpoena, as needed," and that the case was therefore moot.[74] According to appellees, Continental did not, however, agree to produce its bid files.[75] *Second*, as previously mentioned, the FTC has now offered, as a basis of settling its dispute with Superior, to modify specification G ". . . to require Superior

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[72] Transcript of 13 Dec. 1973 Hearing, App. II at 431a. The "one exception" which the court provided for is discussed in more detail *infra* at note 76 & accompanying text, & pp. 37-39.

[73] 1974-1 Trade Cases ¶ 74,964 (D.D.C. 1974).

[74] Stipulation, *FTC* v. *Continental Oil Co.*, No. 74-1552 (D.C. Cir., filed 18 June 1974).

[75] Supplemental Memorandum for Appellees Texaco Inc., Standard Oil Co. (Indiana), Shell Oil Co., Exxon Corp. and Mobil Oil Corp. (filed 12 April 1976) at 34.

> to produce only documents containing *proved* natural gas reserve estimates." [76] By agreeing that production of all subpoenaed documents other than bid files was satisfactory compliance for Continental and by offering to settle for production by Superior of only those documents containing proved reserved estimates, the FTC necessarily recognized the correctness of the District Court's determination that bid files are irrelevant.

In its supplemental brief on rehearing en banc, the FTC argues that resolution of the bid file relevance issue somehow hinges upon resolution of the collateral estoppel issue.[77] This both distorts the holding of the District Court and misstates appellees' position. This court's determination of the bid file issue (as well as its determination of all other relevance issues raised herein) should be entirely independent of its resolution of the collateral estoppel issue. Relevance and collateral estoppel are two of three wholly independent legal grounds for affirming the District Court's major limiting modifications. (As mentioned earlier, the third ground is burdensomeness.)

The affidavit of H. R. Hirsch, appended to Brief for Appellee, Mobil Oil Corp. (filed 8 Nov. 1974), lucidly explains why data included in the producers' bid files has no logical or scientific relevance to any investigation of reports made after the drilling and development of a lease has commenced. In response to this affidavit by a qualified expert with twenty years experience in the oil and gas industry, the FTC offers only the argumentative affidavit of an FTC attorney who states that he has seen some proved reserve data in bid files which he has inspected.[78] The FTC's failure to offer rebuttal testimony

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[76] FTC Statement of Issues and Proposed Modifications re Superior (filed 19 May 1976) at 3 (emphasis added).

[77] Supplemental Brief for Appellant on Rehearing *En Banc* (filed 31 March 1976) at 29-30.

[78] Affidavit of Theodore L. Lytle, Jr., App. IV at 633a.

by another qualified expert leads us to believe that it has been unable to find an expert willing to endorse its unsound, unscientific, and illogical speculations about the possible relevance of bid file data.

The simple fact is that estimates based on drilling—on actual physical penetration of geological structures—are so superior to speculative bid file estimates based on various geophysical tests that they immediately and completely supersede the earlier estimates. Even if the FTC is completely free of collateral estoppel limitations (as a majority of this court holds) and is allowed to pursue the broadest investigatory purpose it or this court can now envision, only reserve estimates and reports based on drilling (where hydrocarbon-bearing structures have been penetrated) will be of any relevance. After drilling, all prior estimates (there are no prior reports since only *proved* reserve estimates are reported) become nothing but irrelevant, superseded, and misleading.

Of course, if after making a successful bid on a piece of property a producer does not drill promptly, or if after drilling and discovering proved reserves the producer does not promptly report its discovery, then there might be some cause to look into the company's bid files.[79] These possible delays in drilling and reporting, although not supported by any evidence before the District Court,[80] were exactly what the court had in mind when it made the following provision in both orders here under review:

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[79] *See* our discussion of the FTC's delay theories *infra* at note 83 & accompanying text, & pp. 51-52.

[80] In fact, the only expert testimony before the court indicates that "[o]nce a lease is purchased, . . . [d]rilling commences promptly . . . ." Affidavit of H. R. Hirsch at 13, appended to Brief of Appellee, Mobil Oil Corp. (filed 8 Nov. 1974).

> The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.[81]

Additionally, at the 13 December 1973 hearing, Judge Hart expressly notified the FTC that he would be receptive to a motion for the production of any bid file where the Commission could show him that ". . . a company ha[d] been awarded a bid on a propery and delayed an unreasonable time in drilling. . . ." [82] Since through its subpoena, as enforced and modified by the District Court's Six-Company Order, the FTC would have at its disposal all the information necessary to make a showing of delayed drilling or delayed reporting [83] (if either

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[81] App. III at 471a & App. IV at 810a.

[82] Transcript of 13 Dec. 1973 Hearing, App. II at 431a (quoted in its entirety in text accompanying note 72 *supra*).

[83] The FTC's subpoena as modified by the District Court's order will still yield:

(1) documents indicating *the date drilling commenced* in specific fields, portions of fields, leaseholds, and/or portions of leaseholds which underlie proved natural gas reserve estimates (specification H.5.d.);

(2) documents which refer, analyze, compare, comment on, set forth, and/or relate to any *lease nominations or bids* which underlie proved natural gas reserves (specification I.3.); and

(3) documents which refer, analyze, compare, comment on, set forth, and/or relate to any *failures or delays*, for whatever reason, *in reporting proved reserves* of natural gas to the AGA, including any failures or delays by personnel of the AGA to identify to subcommittee members all fields containing proved reserves (specification J.1.).

The District Court did order that "only the immediate data used to make the [proved reserve] esitmate need be submitted" (Six-Company Order ¶ 2.a.), but we would not read this limi-

such practice exists), the District Court's approach seems perfectly sound—especially in light of the highly confidential nature of these files.

With regard to bid files, the FTC advances, in its supplemental brief on rehearing en banc, the following three theories of relevance:

(1) The bid files may be relevant to the calculation of proved reserves because they may contain reserve figures for *adjacent tracts.*[84]

(2) The bid files may be relevant in establishing a lease history which, by permitting *comparison of proved reserve figures* for a tract *with initial speculative estimates* contained in bid files, might indicate that the proved reserve figures were in error or misstated if they were markedly lower.[85]

(3) Bid files may be relevant to determine whether appellees have a *practice of defering drilling* in certain circumstances to minimize the extent of proved reserves even though they regard their untested estimates to be of comparable degree of certainty.[86]

In building up the informational foundation necessary to understand the FTC's bid file theories, we have necessarily touched upon these three theories to some degree. Now, without being unnecessarily repetitive, we will briefly examine and show the error of each theory.

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tation to exclude any of the above documents; nor would we characterize any of the above information as "raw field data."

[84] Supplemental Brief for Appellant on Rehearing *En Banc* (filed 31 Mar. 1976) at 31-32.

[85] *Id.* at 32.

[86] *Id.* at 32-33.

1. *Possible Existence of a Limited Number of Proved Reserve Estimates in a Few Bid Files*

It is highly unlikely that a producer's bid files would ever include proved reserve estimates. In only one situation is this even hypothetically possible. If a company leased a tract adjacent to an open, unleased tract, and commenced drilling on its tract, perhaps that company could develop sufficient data to make proved reserve estimates for some portion of the adjacent open tract. If the company bid successfully on the open tract and obtained it, then these proved reserve estimates for the adjacent tract would be called for under the subpoena, as enforced by the District Court. If, however, the company did not bid successfully on the open tract, then it could conceivably have in its bid files proved reserve estimates for a tract which was still open or leased by another company.[87]

In any event, the FTC's adjacent tract argument does not support its demand for appellees' bid files *in toto*—

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[87] In response to this argument made by the FTC in the District Court, Mobil undertook a search for any proved reserve data in its bid files and found none. Brief for Appellee Mobil Oil Corp. (filed 8 Nov. 1974) at 17-18; Transcript of 13 Dec. 1973 Hearing, App. II at 422a. At the 13 Dec. 1973 hearing counsel for Mobil also persuasively discounted the significance of any proved reserve data it or any other company might have for a tract leased by a competitor:

> [I]f somebody buys a tract next to a tract that we have developed, that means that they are going to develop that tract as quickly as they can because if there is an overlap in the reservoir between the two tracts and they don't immediately drill wells on it, then Mobil's developed tract will drain the contiguous tract. So in every situation where that may occur our reserve estimates would be immediately superseded [and] completely obsolete because whoever purchased the adjoining tract would drill wells on it themselves.

Transcript of 13 Dec. 1973 Hearing, App. II at 422-23a.

particularly the highly confidential and sensitive documents reflecting bid methodology (*i.e.*, appellees' bid models). At most, the FTC's argument would support an order directing them to extract and produce all proved reserve data (if any) found in their bid files. But at this point even this order would be a meaningless gesture, since *all parties* (except Superior) *have agreed in their stipulations that the District Court's Six-Company order may be modified by adding the following proviso*:

> *Provided that*, to the extent otherwise called for, any and all proved reserve data contained in bid calculation files and relating to tracts covered by [this subpoena] shall be produced.[88]

2. *Evaluating the Accuracy of Proved Reserve Estimates by Comparing Them to Earlier, Superseded, Speculative Estimates in Bid Files*

We agree with appellees: "The FTC's argument that comparing proved reserve estimates on a tract with earlier, superseded speculative reserve estimates may reveal something about the accuracy of the proved reserved estimates illustrates dramatically the danger of relying solely on legal imagination [as a majority of this court does] in a highly technical area such as gas reservoir engineering." [89] As the only qualified expert whose testimony was before the District Court explained,

> [T]he speculative reserve estimates which are based purely on raw geological and geophysical data are often grossly inaccurate. Thus to suggest that they should be compared to proved estimates to see if there has been under-reporting is absurd.[90]

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[88] Six-Company Stipulation at 2.

[89] Supplemental Memorandum for Appellees Texaco Inc., Standard Oil Co. (Indiana), Shell Oil Co., Exxon Corp. and Mobil Oil Corp. (filed 13 April 1976) at 39.

[90] Affidavit of H. R. Hirsch at 11, appended to Brief for Appellee, Mobil Oil Corp. (filed 8 Nov. 1974).

The evidence and argument presented to the District Court permitted it to make the factual determination that the producers' bid files contained highly speculative estimates, which would be rapidly superseded by much sounder estimates, once the winning bidder could begin drilling. After the first well is drilled on a lease, no company relies on bid file data, *nor is such data ever reported to the AGA. Only data relating to proved reserves is reported, and the essential ingredient in the definition of "proved reserves" is that the data is obtained by drilling, by penetration of the formation.*[91]

The "proved reserves" definition is accepted by the industry, the Power Commission, and the Trade Commission here.[92] Thus, even if the bid file data showed a

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[91] *See* definition of "proved reserves" at note 2 *supra*. We recognize that "[t]he proved area of a reservoir may also include *adjoining portions not delineated by drilling* but which can be evaluated as economically productive on the basis of geological and engineering data available at the time the estimate is made." (This, is, of course, the source of the FTC's adjacent tract argument discussed in the immediately preceeding section of this dissent.) This, however, does not mean that drilling is not an essential ingredient in the definition of "proved reserves." As both the FTC and appellees agree, it is possible that the drilling of one portion of a field or reservoir will yield sufficient "geological and engineering data" to permit the calculation of proved reserves for an adjoining portion. It is, nevertheless, impossible to come up with a proved reserve estimate without some drilling—at least on an adjoining portion of the field or reservoir. It should also be noted that the AGA's proved reserve definition (accepted by all parties) *requires the reporting of such adjacent-tract proved reserves*: "[T]he reserves reported should include *total* proved reserves which may be in either the drilled or undrilled portions of the field or reservoir." (Emphasis added.) The important point, for our purposes, is that there always is a drilled portion. There may or may not be undrilled portions yielding proved reserve estimates.

[92] There is no consistently used or accepted definition for reserves other than "proved reserves." Various companies

gross disparity compared to the data on *proved* reserves submitted to the AGA, this would demonstrate nothing except that the company's original bid estimates were sadly in error, for by definition the proved reserve *data must be based on geological information obtained by drilling at a later time than when the bid file data is assembled.*[93] The preliminary and superseded data in the bid files has no relevance whatsoever in determining whether preliminary bid file estimates will later be moved into the more strictly defined category of "proved reserves".[94] In the absence of any such correlation, the

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describe their data, at different stages, as "probable," "possible," "recoverable," and "ultimately recoverable."

[93] The FTC's and the majority's reasoning presumes that there is some correlation between a producer's speculative estimates and its actual production history. No such correlation could, or does in fact, exist. On the contrary, the uncontradicted evidence on the record demonstrates that speculative reserve estimates have *no* "relationship with or bearing on proved reserve estimates made on the basis of drilled well data." Affidavit of H. R. Hirsch at 10, appended to Brief for appellee, Mobil Oil Corp. (filed 8 Nov. 1974).

By definition, *"proved" reserves* are those reserves whose existence has been established through well logs, core samples, and other concrete data obtained by actual drilling, whereas "speculative" reserve data (the only type of data found in most bid files) are based upon seismic studies, measurements of the changes in the earth's gravitational and magnetic fields, and other inferential geological techniques. Even after all inferential calculations are completed there is no way, apart from drilling, to determine whether hydrocarbons in any form are present and, if so, whether they exist in producible quantities. Nor is it possible to determine accurately, without drilling, the depth of the reservoir, its thickness, extent, and porosity—factors which bear significantly upon whether, and to what extent reserves are present. Thus, even the use of the term "speculative reserves" or "unproved reserves" is itself "a misnomer because [by definition] no hydrocarbons have yet been *found.*" *See id.* at 2, 5, & 11.

[94] The total irrelevance of speculative preliminary reserve estimates to proved reserves is vividly demonstrated by Ex-

FTC's hypothesis that compilation of a "lease history" dating back to the initial speculative estimates might be relevant in ascertaining possible violations of Section 5 is plainly unsound.[95]

3. *Delays in Drilling or Reporting*

The Trade Commission makes one final argument: that companies sometimes delay drilling in order not to acquire any proved reserve data which would supersede the speculative estimates in the bid files and which they would be obligated to report to the AGA. Even though the likelihood of such behavior (*i.e.*, of a company paying millions of dollars for a lease and then permitting that lease to go undrilled) seems quite remote,[96] the District

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hibits F and G to the Hirsch affidavit. Those exhibits show that, for the two tracts with which they deal, the original speculative estimate was, in one case, less than one-tenth of and, in the other case, more than double the eventual proved estimate. Another example is provided by Mobil's experience in the 1968 Texas Offshore lease sale. On the basis of what Mobil considered reliable inferential geological information with respect to so-called speculative reserves, it spent $32 million for certain offshore leases. Eighteen wells were drilled without any producible hydrocarbons being found, and Mobil subsequently relinquished all ownership rights in these tracts. See *id.* at 10 & Exhibits F & G.

[95] As demonstrated above, two of the premises underlying the FTC's erroneous theory are also mistaken. Appellees do not "regard their untested estimates to be of a comparable degree of certainty" with their proved reserve estimates, as the FTC asserts. Supplemental Brief for Appellant on Rehearing *En Banc* at 33 (filed 31 Mar. 1976). Nor do "the same or substantially similar underlying data" support both proved and unproved reserve estimates. *Id.* at 34. The inferential seismic and geophysical data underlying speculative reserve estimates are not comparable and bear no resemblance to the *drilling* results upon which proved reserve estimates are based.

[96] According to the Hirsch affidavit, "Once a lease is purchased, the bid files are of no further use whatsoever. *Drilling*

Court, as we have mentioned before, expressly provided for just such a circumstance.[97] Considering the highly sensitive and confidential nature of appellees' bid files, the District Court's approach seems particularly sound. Indeed, in the case of Continental Oil Co., even the FTC accepted this approach as satisfactory.[98]

If a few instances of deferred drilling or reporting do actually exist, the FTC would be able to detect such behavior with the information called for by the subpoenas, as enforced by the District Court's order.[99] By no means, however, would a few such instances justify the blanket subpoena of *all* bid files (or even the subpoena of the contents of one entire bid file) by the FTC. We would affirm the District Court's ruling, since it amply preserves the FTC's interest in having access to those speculative reserve estimates in bid files involved in any case of delayed drilling or reporting, while at the same time it affords appellees protection against the forced disclosure of sensitive data where such information is irrelevant to any alleged delay in drilling or reporting.

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commences promptly and a whole new set of hard data is obtained from the actual drilling." Affidavit of H. R. Hirsch at 13, appended to Brief for Appellee, Mobil Oil Corp. (filed 8 Nov. 1974). This comports with common economic sense, and there is certainly no evidence on the record to the contrary.

[97] Transcript of 13 Dec. 1973 Hearing, App. II at 431a (quoted at p. 42 *supra*).

[98] This same provision was included in the order entered by Judge Hart in *FTC* v. *Continental Oil Co.*, 1974-1 Trade Cases ¶ 74,964 (D.D.C. 1974), *appeal dismissal*, No. 74-1552 (D.C. Cir., 2 July 1974). Apparently, the FTC found the provision to be satisfactory since it dismissed its appeal. Stipulation, *FTC* v. *Continental Oil Co.*, No. 74-1552 (D.C. Cir., filed 18 June 1974). *See* text accompanying note 65 *supra*.

[99] *See supra* at note 83 & accompanying text.

C. *Summary on the Relevance Issue*

How wide of the mark is the Trade Commission's understanding of the differing roles of different type reserve data—a misunderstanding which unfortunately has infected the majority opinion—is capsuled by this statement: "But *any* estimate of reserves—however defined—on which a company *relies* in the course of its business is relevant to the company's practices in *estimating* and *reporting* reserves." [100]

Of course a company *relies* on each of the estimates of reserves it makes, but at different *stages* of the natural gas business, and with different degrees of confidence and far different purposes. The most preliminary and superficial of exploratory techniques may yield some clues as to natural gas presence or absence. Reliance at this stage is expressed simply as a decision to spend more money on additional exploration. At a later stage, with data assembled from much more sophisticated techniques—but short of drilling or penetration of the geologic formation, the company may rely on the preliminary data to the extent of bidding for a lease.

In bidding for a lease the company obviously has some preliminary reserve estimate on which it relies, for the purpose of bidding; otherwise, it would never bid or would make a total gamble. Not only is this reserve estimate never reported, not only is it never revealed to a competitor, but even within company walls it is a closely guarded secret. This preliminary reserve estimate is a product of the "bid model" of the company and the scientific data amassed on that individual tract, and constitues the heart of the "bid file."

At this point we note that the Trade Commission has never stated, or even hinted, that it suspects and is

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[100] Maj. Op. at 27 (emphasis added).

inquiring into collusive *bidding* by the gas producers. Nothing in the record suggests that. If that were an object of inquiry, the contents of the bid files obviously could be relevant, *e.g.*, to show that from differing scientific calculations there strangely emerged similar bids, or that based on similar scientific data the companies bid and failed to bid.

But the inquiry of the FTC is into the *reporting of proved reserves* and *at the bidding stage* of developing a gas deposit *there is no such thing as a* PROVED reserve, and there is no reporting (or revealing) of such reserve estimates as the companies do have. Then when proved reserve data is obtained—by penetration of the formation only—all the preliminary reserve data is literally junked, it is relied upon no more by the companies, reliance is placed entirely upon the proved reserve data, which *is* reported to the AGA, and which is to be produced—totally—by the subpoenas as modified by the District Court. Anything else the FTC seeks in the way of reserve estimates is completely immaterial to the FTC's purpose of investigating the collusive or false reporting of proved reserves.

One other statement from the majority opinion will serve to illustrate why, in reading the briefs and hearing oral arguments, we have received the impression that the great problem in this case has been and still is the curtain of ignorance between the Trade Commission staff and counsel and the gas producers, sheer ignorance on the part of the investigators as to the science and economics of the natural gas industry which leaves them without any rational concept of relevance or direction to their inquiry. As the majority says (approvingly, we fear):

> "The Commission also suggests that bid files could be used to establish lease histories. . . . [I]f [the] 'speculative' estimates were *consistently* higher than the reported 'proved' estimates, and by a roughly

> equivalent amount—this might well be indicative of anticompetitive practices." [101]

In this statement the Trade Commission exhibits a basic misconception concerning the significance of any disparities between the estimates of preliminary and proved reserves. Repeated disparities of this variety *are* significant—indeed, they are precisely the type of error which would cost a company millions of dollars and get a group of geologists fired—and which have absolutely nothing to do with the kind of inquiry the Trade Commission is making here. If the preliminary or "speculative" estimates turn out in repeated instances to be widely different from later proved reserve estimates, there will be considerable soul-searching on the part of the company geologists and higher officials. If time after time the *proved* reserves delineated by drilling are different from the gas reserve estimates based on preliminary scientific data, what was wrong with the preliminary estimates? What was wrong with the bid model? The company will seek to find out, to correct its bidding on the next available leases, whether the error was in bidding too much or in bidding too little and seeing a profitable tract go to a competitor. But in doing so, we may be sure that the company will not breathe a word of it to a competitor or to the AGA.

This is a matter of accuracy of *bidding* calculations, it has nothing to do with the accuracy of proved reserves, *but it is the guts of competition in the gas industry.* If bid files, bid models, bid calculation techniques are brought out into the public domain [102] by enforcement of the FTC's unmodified blunderbuss subpoena, then effective competition in both exploration and bidding will be discouraged. We had always assumed that the principal duty of the Trade Commission was to preserve effective competition; it appears in this case not to know the effect of what it is doing.

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[101] *Id.* at 27 n.32 (emphasis in original).

[102] See note 3 *supra.*

The most frightening aspect of this revealed lack of comprehension by the Trade Commission is to contemplate what the FTC will *do* with the bid file data, if the subpoenas are allowed to stand unmodified. Obviously, from the instances publicly known and cited to us by appellees herein, the FTC will discover in the files of every company many horrible examples of the grossest errors in preliminary calculation of reserves as compared to the proved reserve data later developed by drilling. Given the FTC's concept of relevancy as argued herein, what conclusions will the FTC draw? If a company originally estimated a hundred million cubic feet of recoverable gas, and made an appropriate bid thereon, and now reports only *ten* million cubic feet in proved reserves, will the FTC trumpet that the company is falsely underreporting proved reserves, because the original estimate was so different? If a company estimated and bid the same amount, drilled twenty dry holes, and abandoned the lease—with proved reserves of zero—the same logic would hold, although we would expect the FTC to have enough good sense not to claim on these facts that the company was deliberately underreporting proved reserves. If Company A estimates a hundred million cubic feet of recoverable gas on a tract, but decides not to bid on it because of a preference for other tracts in the same auction, and Company B is the successful bidder but later reports only ten million cubic feet of proved reserves, will the FTC accuse Company B of false underreporting of proved reserves?

The examples could be multiplied endlessly, with but only one question to be put to the FTC: *Can the FTC draw a conclusion of false or collusive reporting from discrepancies between the proved reserve data and the preliminary reserve estimates?* If the FTC thinks it can, then it is in the process of perpetrating a terrible hoax on the American people. If the FTC admits it cannot,

then it concedes the irrelevancy of the preliminary reserve estimates for the purpose of its investigation.

The conclusion is inescapable: the preliminary estimates of reserves before drilling on which bids are made have no earthly relevance to proved reserve calculations based *solely* on drilling into the geological formation. Actual production from drilling is the proof, hence the term "*proved* reserves"; every estimate, no matter how much scientific thought has gone into it, made before is nothing but an educated guess—it is not *proof*, and it has no bearing on the accuracy of the proved reserve figures, which alone are reported.

In sum, none of the theories of bid file relevance advanced by the FTC withstands analysis. The leading Supreme Court case on FTC investigations, *United States* v. *Morton Salt Co.*,[103] makes clear that the burden is upon the FTC to prove that the bid files (and all other documents not related to proved reserves)[104] are "reasonably relevant" to its investigation.[105] This the FTC has not

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[103] 338 U.S. 632 (1950).

[104] We noted earlier that the District Court may not have reached the issue of relevance with regard to *all* documents that do not relate to proved reserves. Although the bid files certainly fall within this larger category, throughout these proceedings they have been treated and discussed as if they were a discrete class of documents. The record clearly indicates that the District Court gave separate consideration to the bid files and ultimately based those portions of *its final order concerned with bid files on a finding that these files lacked relevance. See* Transcript at 13 Dec. 1973 Hearing, App. II at 431a.

[105] *A fortiori*, the FTC has not met the *higher* standard of relevance which must be established when such extremely sensitive documents as bid files are subpoenaed. *See, e.g., Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324, 330 (9th Cir. 1961); *E. B. Mueller & Co.* v. *FTC*, 142 F.2d 511, 520 (6th Cir. 1944); *Zenith Radio Corp.* v. *RCA*, 106 F.

done, either here or in the District Court. The finding on relevance by the District Court is "essentially factual in nature" and cannot be overturned unless it was "clearly erroneous" or "an abuse of discretion." [106]

V. Burdensomeness

We turn now to the second independent ground supporting the District Court's order—burdensomeness. In formulating its order enforcing the FTC's subpoena, the District Court had to consider the reasonableness of the burden of compliance placed upon the respondents.[107] And where, as here, this consideration leads to a finding that the subpoena is unduly burdensome, the District Court may act to alleviate this burden by modifying or partially enforcing the subpoena.[108] Such modification or

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Supp. 561, 565 n.6 (D. Del. 1952); *British Oxygen Co.*, No. 8955 (FTC, 23 April 1974) (Slip op. at 8), *aff'd*, 29 May 1974; *Seeburg Corp.*, 70 F.T.C. 1809, 1813 (1966); *Puget Sound Salmon Canners Inc.*, 53 F.T.C. 342, 353 (1956); *Maico Co.*, 51 F.T.C. 1197, 1203 (1955). *See generally* Henke, *Federal Trade Commission Hearings: Rights of a Non-Party to Protect Its Witnesses and Documents*, 21 Am.L.Rev. 130, 143 (1971).

Access to the documents reflecting appellees bid methodology and preliminary speculative reserve estimates is strictly limited to executive personnel. In fact, this information is kept in safe deposit boxes or vaults and is generally maintained in handwritten form to limit exposure to clerical personnel. *See* Affidavit of H. R. Hirsch at 11-12, appended to Brief for Appellee, Mobil Oil Corp. (filed 8 Nov. 1974).

[106] *United States* v. *Nixon*, note 38, *supra; FTC* v. *Lonning*, note 39, *supra.*

[107] *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967) (quoted at p. 22 *supra*).

[108] *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *Adams* v. *FTC*, 296 F.2d 861, 866-67 (8th Cir. 1961), *cert. denied*, 369

partial enforcement is an exercise of the District Court's sound discretion and may be overturned on appeal only for an abuse of discretion.[109]

U.S. 864 (1962); *Hunt Foods & Indus., Inc.* v. *FTC*, 286 F.2d 803, 811 (9th Cir. 1960), *cert. denied*, 365 U.S. 877 (1961); *Chapman* v. *Maren Elwood College*, 225 F.2d 230 (9th Cir. 1955); *Comet Electronics, Inc.* v. *United States*, 381 F.Supp. 1233, 1242 (W.D.Mo. 1974), *aff'd*, 420 U.S. 999 (1975); *Genuine Parts Co.* v. *FTC*, 313 F.Supp. 855, 857 (N.D.Ga. 1970), *aff'd*, 445 F.2d 1382 (5th Cir. 1971); *In re United Shoe Mach. Corp.*, 6 F.R.D. 347 (D.Mass. 1947). *See also See* v. *City of Seattle*, 387 U.S. 541, 544 (1967).

[109] *FTC* v. *Lonning*, 539 F.2d 202, 211 (D.C. Cir. 1976); *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945); *FCC* v. *Cohn*, 154 F. Supp. 899, 912 (S.D.N.Y. 1957). *See also Penfield Co.* v. *SEC*, 330 U.S. 585 (1947) where all members of the Supreme Court (six in the majority, one concurring, and two dissenting) agreed that an abuse of discretion standard was the appropriate standard for appellate review of a district court's refusal to grant the coercive enforcement relief sought by the Agency. Justice Douglas, writing for the majority, held that in the absence of a finding by the district court (1) that the Commission's request had become moot, (2) that the documents produced satisfied the Agency's legitimate needs, or (3) that the additional documents sought were irrelevant to the SEC's statutory functions, the district court had committed an "abuse of discretion" in failing to grant the full remedial relief which the Securities Act of 1933 placed behind the Commission's orders. *Id.* at 592. Concurring, Justice Rutledge would have ". . . remanded to the District Court with directions to exercise *its discretion* in framing the relief adequate and appropriate to make effective the Commission's right to disclosure." *Id.* at 603 (emphasis added). Dissenting for himself and Justice Jackson, Justice Frankfurter wrote,

> Bearing in mind that the District Court was not an automaton which must unquestionably compel obedience to a subpoena simply because the Commission had issued it, we must consider whether the District Court had *abused* the fair limits of *judicial discretion*. . . .

[Continued]

In *FTC* v. *Lonning* this court recognized the appropriateness of an abuse of discretion standard when it recently had to evaluate the burden placed on a cereal manufacturer by a district court's order enforcing another FTC subpoena. The cereal manufacturer took the position that certain data called for under the subpoena ". . . should be disclosed only to counsel of record who are 'outside' counsel and should not be revealed to any counsel of record who is inside or house counsel for a respondent." [110] This court disagreed and sustained the District Court which had adopted the protective order issued by the administrative law judge permitting disclosure to all counsel of record. The court concluded,

> We see no *abuse of discretion* in limiting the disclosure of the individual brand cost data to counsel of record. Although this Court has previously commented that there may be some distinction between disclosure of trade secrets to house counsel, and outside counsel, we find no *abuse of discretion* in refusing to limit such disclosure in this case . . . . The decision as to the type and scope of any protective order rests within *the sound discretion of the trial judge* and must be determined on a case by case basis. There is nothing in this record which would support a determination that the district court *abused its discretion* by its adoption of the protective order issued by the Administrative Law Judge.[111]

Thus, like appellants in *NLRB* v. *Northern Trust Co.*, our colleagues and the FTC ". . . are in the unenviable

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[109] [Continued]

> On the record before us, Judge Hall exercised *allowable discretion* in finding that the subpoena had spent its force, and in concluding not to compel obedience to it.

Id. at 607-08 (emphasis added).

[110] *FTC* v. *Lonning*, 539 F.2d 202, 206 (D.C. Cir. 1976).

[111] *Id.* at 211 (footnotes and citations omitted) (emphasis added).

position of sustaining the great burden of showing an abuse of discretion." [112] We conclude that they, too, have failed to do so.

In determining the reasonableness of the burden of compliance cast upon appellees, the District Court was, of course, free to consider all pertinent facts and circumstances. The repetitive and cumulative nature of the Trade Commission's subpoena (in view of the Power Commission's previous factual determination that AGA proved reserve data was reasonably reliable for rate-making purposes) [113] was, and should have been, an important factor in the District Court's assessment of burden.[114] The repetitiveness of an agency's demands cannot be ignored or excused merely because the repetition and cumulativeness are the result of similar demands made by other agencies of the same federal government.[115]

The majority's position in this regard appears to be that repetition and cumulativeness must be excused where agency jurisdictions overlap or where, as has become increasingly common, different agencies or officers of the federal government assume an adversarial or competing posture toward one another. We strongly reject this position, a position which will leave district courts—even in the most extreme cases—powerless to ameliorate the effects of repetitive agency demands. In the words of one

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[112] 148 F.2d at 29.

[113] *See* our discussion of these FPC proceedings *supra* at pp. 13-20.

[114] *See Westinghouse Elec. Corp.* v. *City of Burlington*, 351 F.2d 762, 767 (D.C. Cir. 1965); *Application of Consumers' Union of the United States, Inc.*, 27 F.R.D. 251, 254 (S.D.N.Y. 1961).

[115] *Cf. S & E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972); *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir. 1970), *cert. denied*, 400 U.S. 942 (1970).

of the appellees, "Such a result would create bureaucratic competition having the characteristics of a Kafka nightmare in which no response to an agency is ever sufficient because of the needs of a competing agency to show the insufficiency of a prior response to the former agency." [116] In such cases of competing agencies or overlapping jurisdiction, we would leave it to the sound discretion of the district courts to determine whether the effort and expense involved in responding to repetitive agency demands imposes an unfair and unreasonable burden on the responding parties. Being another essentially factual determination, this has always been, and should remain, the province of the district courts.

Here there was a full showing of the immense burden which even partial compliance with the FTC's subpoena would impose on appellees. For example, Standard Oil Co. of California filed in the District Court an affidavit of one of its vice-presidents setting forth a preliminary estimate of the time and cost of compliance, as he understood the subpoena's specifications. He stated that in order to locate the responsive documents, more than four million documents would have to be reviewed requiring approximately sixty-two man-years. The total cost of searching, reviewing, reproducing, and refiling was estimated at approximately four million dollars.[117]

Considering the purpose of the Trade Commission's investigation [118] and the factual determination of the prior Power Commission investigation into reserve re-

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[116] Supplemental Brief for Appellee Standard Oil Co. of California on Rehearing En Banc (filed 15 April 1976) at 20.

[117] Affidavit of L. A. Swanson, App. IX at 1761a-62a. *See also* Affidavit of John T. Marshall (an employee of Mobil Oil Corp.), App. XI at 2035a-39a.

[118] *See* our discussion of "purpose" in section IV-A *supra*.

porting,[119] the District Court was eminently fair and reasonable (1) in limiting the disclosures required under the FTC's subpoena to those documents relating to the reporting of proved reserves and (2) in not permitting the use of any such documents to reinvestigate or redetermine the amount of proved gas reserves in Southern Louisiana. By no stretch of the imagination can either of these limitations be characterized as an abuse of discretion.

On burdensomeness issues, the majority opinion recognizes the "abuse of discretion" standard (there's too much binding authority on this point), but attempts to escape from the teeth of the abuse of discretion standard by arguing that the District Court's determinations of burden were intimately tied to and colored by improper applications of collateral estoppel and relevance. Therefore, says the majority, we shall review these modifications for "mere error." [120] The majority cannot escape their obligatory standard so easily. In trying to do so, they have confused the overlap of some facts basic to more than one legal theory with an overlap of the legal theories themselves.

Of course there is some overlap in the factual foundations underlying burdensomeness and collateral estoppel; to some extent both grounds rely upon the finding of fact discussed in Section II *supra*. (However, the third ground affirmance—relevance—is entirely independent of collateral estoppel and burden, both in terms of legal theory and underlying factual foundation.) *Notwithstanding*

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[119] As we demonstrated in Part II *supra*, the District Court's factual determination that, for the years covered by the FTC's subpoena, the Federal Power Commission had already (1) determined natural gas reserves and (2) considered and ruled upon the validity and accuracy of such reserves, was soundly based on evidence in the record.

[120] *See* Maj. Op. at 37-39.

the overlap between FACTUAL *foundations, burdensomeness and collateral estoppel are independent* LEGAL *grounds for affirming the District Court's "use" restriction. Similarly, burdensomeness and relevance are independent legal grounds for affirming the District Court's* PROVED *reserve limitation.* Each of these grounds would be sufficient without the others. Accordingly, there is no way, as the majority opinion puts it, that the District Court's views on collateral estoppel and relevance could have somehow "infected" its determinations based on burden. Even if the legal theories of collateral estoppel and relevance had never been raised by appellee's counsel or ever thought of by the District Court, the major modifications of the court's order would be fully sustainable on burdensomeness grounds alone.

There can be no question that the Trade Commission has jurisdiction to determine whether the antitrust laws or the FTCA has been violated. However, the District Court was entitled to conclude on the present record (1) that the Trade Commission desired all reserve data in the possession of appellees in order to recompute independently Southern Louisiana reserves, and (2) that the Power Commission, on the basis of a contested evidentiary hearing, had found that the industry's figures for Southern Louisiana reserves for the relevant years were accurate. Based on these findings, the District Court could reasonably have concluded that it would be unjust, unreasonable, and unduly burdensome to require the production of every scrap of data which related to reserves *of any kind.* By limiting production to "documents containing or underlying *proved* natural gas reserve estimates" and by restricting the use of these documents to "the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates," the court drew a reasonable balance between the investigatory

needs of the Trade Commission and the producers' burdensomeness claims. Similarly, through its "use" restriction the court struck an equally reasonable balance between the investigatory needs of the FTC and the producers' collateral estoppel claims.

The majority opinion has not only managed to confuse overlapping facts with overlapping law, in their effort to escape applying the abuse of discretion standard, but the opinion manages to confuse in which forum a burden of proof concept is applicable. The majority claims that "[t]he burden of showing that the request is unreasonable is on the subpoenaed party."[121] Of course it is—*but in the District Court!* On appeal we as an appellate court review the issue of burdensomeness with an abuse of discretion standard.

Why the majority falls into this error is obvious. From the start, and continuing throughout, the majority opinion proceeds as if this court were reviewing directly an administrative agency decision.[122] The majority ignores the intervening action of the District Court in modifying and enforcing the administrative subpoenas, which under the law requires us to review the action of the District Court—not the FTC—under certain well defined standards. Having ignored the District Court and cast themselves in that role, the majority unwittingly adopt a standard fitting for—and applied by—the District Court. A very revealing error. An error which goes a long way to support the Trade Commission's effort to eliminate effective judicial review of administrative subpoenas.[123]

Having stated, from the standpoint of burdensomeness, our position on the District Court's two most important modifications, approving the court's other minor modifica-

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[121] Maj. Op. at 39.

[122] See our discussion under Part I.B. *supra*, pp. 8-10.

[123] Part III *supra*, pp. 20-25.

tions becomes almost an *a fortiori* exercise. Consequently, we will forego any detailed analysis of these modifications, and comment on them only very briefly in section VII. *infra*.

VI. Collateral Estoppel

We turn now to an analysis of the third independent ground supporting the District Court's order—collateral estoppel. Initially, it is important to understand that appellees have never sought, and the District Court did not issue, an order halting the FTC's inquiry in this proceeding. As stated in their initial brief to this court, "Respondents *do not* contend that the FTC has no authority to investigate the allegation of collusive reporting or fabrication of reserve estimates." [124] Appellees *do* contend that under the principles of collateral estoppel, and *alternatively*, in order to prevent the imposition of an unfair burden of compliance, the FTC should not be permitted to redo for a third time what has already been done by another equally competent agency of the federal government.[125]

Having already concluded in Section II *supra* that the District Court's factual determination that the FPC had already (1) determined natural gas reserves and (2) considered and ruled upon the validity and accuracy of such reserves was correct (indeed, implicitly assumed by the majority opinion), we focus now on the question of law confronting the District Court after it made this important finding of fact: Under the circumstances of this case, is it appropriate to give this finding of fact collateral estoppel effect?

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[124] Joint Brief for Appellees Texaco, Inc., Standard Oil Co. (Indiana), Shell Oil Co., and Exxon Corp. (filed 5 Nov. 1974), at 3 (emphasis in original).

[125] *See* note 18 *supra*.

The Supreme Court and this court have clearly stated that an agency or a private party *can* be collaterally estopped in a later court proceeding if a relevant factual issue has already been resolved in a contested hearing before the agency.[126] The Supreme Court recently affirmed this principle in *United States* v. *Utah Construction Co.*:

> Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381; *Hanover Bank* v. *United States*, 152 Ct.Cl. 391, 285 F.2d 455, *Fairmont Aluminum Co.* v. *Commissioner*, 222 F.2d 622; *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.*, 207 F.2d 255. *See also Goldstein* v. *Doft*, 236 F.Supp. 730, aff'd 353 F.2d 484, cert. denied, 383 U.S. 960, where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator.[127]

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[126] *United States* v. *Utah Construction Co.*, 384 U.S. 394, 421-422 (1966); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Pacific Seafarers, Inc.* v. *Pacific Far E. Line, Inc.*, 404 F.2d 804, 809 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) ("Principles of collateral estoppel may properly be applied in administrative cases.") *accord*, *Fairmont Aluminum Co.* v. *Commissioner*, 222 F.2d 622, 627 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955); *Tampa Phosphate R.R.* v. *Seaboard Coast Line R.R.*, 418 F.2d 387, 399 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *International Wire* v. *Local 38, Int'l Bhd. of Elec. Workers*, 357 F.Supp. 1018 (N.D.Ohio 1972), *aff'd*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973).

[127] 384 U.S. at 421-22.

The Supreme Court has also held that collateral estoppel can be applied when the prior proceeding involved a *different* government agency because, for collateral estoppel purposes, agencies of the same government are in privity with one another:

> Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611, 620 "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same." A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell* v. *County of Sac*, 94 U.S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.[128]

Other Circuits have applied both these principles in appropriate cases. The Eighth Circuit in *George H. Lee, Co.* v. *FTC*[129] has held that the FTC was collaterally

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[128] *Sunshine Anthracite Coal Co.* v. *Adkins, supra,* 310 U.S. at 402-03. *See also French* v. *Rishell,* 40 Cal.2d 477, 254 P.2d 26 (1953) (en banc).

Another requirement for the application of collateral estoppel is that "[t]he determination made of the issue in the prior action must have been necessary and essential to the resulting judgment." 1B J. MOORE, FEDERAL PRACTICE ¶ 0.443[1] (2d ed. 1974). Apparently acknowledging that a determination of the validity and accuracy of AGA proved reserve estimates was necessary and essential to the FPC's ratemaking task, the FTC does not argue this issue in this appeal.

[129] 113 F.2d 583 (8th Cir. 1940).

estopped from claiming use of unfair methods of competition where the claim was based on factual issues resolved favorably for defendants in a prior proceeding instituted under the Food and Drug Act. Reciprocally, the Seventh Circuit in *United States* v. *Willard Tablet Co.*[130] upheld the defense of collateral estoppel in a proceeding under the Food and Drug Act where a prior proceeding before the FTC held that defendant's labeling claims were not deceptive. More recently, in *Safir* v. *Gibson*[131] the Second Circuit held that the Maritime Administration, an agency within the Department of Commerce, was estopped from re-investigating and redetermining an issue previously decided by the Federal Maritime Administration.

In *Safir* the Second Circuit gave collateral estoppel effect to the FMC's prior determination that the rates of a conference of water common carriers were unjustly discriminatory and unfair to plaintiff Safir's company. Writing for the court, Judge Friendly explained,

> . . . While the issues here may not have been purely factual, they were fully litigated before the agency designated to determine them. . . . The Restatement of Judgements, § 70, says that even determinations of questions of law are conclusive between the parties on a different cause of action unless injustice would result. . . .
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> It is the FMC, not the Maritime Administration, that has the expertise to pass on whether rates are unfair or unduly discriminatory, . . . and it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it. . . .

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[130] 141 F.2d 141 (7th Cir. 1944).

[131] 432 F.2d 137 (2d Cir. 1970), *cert. denied,* 400 U.S. 942 (1970).

> *We recognize there is a general rule against judicial interference with administrative proceedings prior to the issuance of a final order. . . . Nevertheless we believe . . . it appropriate for us to direct conformity with our views on the preclusive effect* of the FMC decision here and now. . . . [T]he reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect a successful party from being vexed with needlessly duplicitous proceedings. . . . *If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably. . . .*[132]

We conclude that the Trade Commission is now in the same position as the Maritime Administration was in *Safir*, as the United States was in *Willard Tablet*, and as the FTC itself was in *George H. Lee*.

Regardless of the general applicability of res judicata and collateral estoppel principles between administrative adjudications involving different agencies, on the facts of this case application of the doctrine of collateral estoppel is particularly warranted. The Power Commission is *the* federal agency with special technical and scientific expertise on factual issues involving the oil and gas industry (*e.g.*, the accuracy of AGA proved reserve estimates), and as such its findings of fact on oil and gas matters are entitled to the respect of other government agencies. *The Trade Commission* knew of the Power Commission's adjudicatory proceeding in *So La II* when it initiated its own investigation into gas reserve reporting *and could have intervened in the Power Commission's ongoing investigation.* This way, perhaps the Trade Commission could have avoided the charge leveled so persuasively by the producers in the District Court—that *some of the documents called for under the Trade Commission's subpoena were sought for the sole purpose of*

[132] *Id.* at 143 (citations omitted).

collaterally attacking a Power Commission finding of fact on an oil and gas matter.

The District Court, although it found the producers' charge to be perfectly valid, decided *not* to restrict production to only those documents which could never be used to attack collaterally the FPC's prior finding. Instead, the court took the less restrictive approach of placing the following "use" restriction on all data produced pursuant to specifications G, H, and I:

> All production . . . shall be made for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves.[133]

Thus, even though some data containing or underlying proved reserves, and ordered to be produced by the court, could conceivably be used by the Trade Commission in a collateral attack on the Power Commission's reserve estimates finding, this "use" was strictly proscribed by the court's order. It is this "use" restriction, soundly based on either collateral estoppel *or* burdensomeness grounds, which the Trade Commission attacks so vigorously in this appeal.

Having briefly explained why it is appropriate to give the Power Commission's reserve estimates finding collateral estoppel effect, we now direct our attention to the reasons which the FTC and a majority of this court give for reaching an opposite result. Generally, they conclude that the doctrine of collateral estoppel has no applicability here because (1) it is inappropriate to consider

[133] Six-Company Order, App. IV at 807a (¶ 2.(d)). For a similar "use" restriction formulated in another investigative subpoena enforcement proceeding, *see Lynn* v. *Biderman*, 536 F.2d 820 (9th Cir. 1976).

the issue of collateral estoppel at the subpoena enforcement stage of an investigatory proceeding, (2) the Power Commission's reserve estimates finding was made in the context of a quasi-judicial ratemaking proceeding, and (3) the Power Commission found the AGA reserve figures "reasonably reliable" for ratemaking purposes only. To our mind, none of these reasons are valid or should preclude application of administrative collateral estoppel.

A. *The Appropriateness of Considering the Issue of Collateral Estoppel in this Subpoena Enforcement Proceeding*

The issue of collateral estoppel is not an issue on the merits that must be deferred until an administrative complaint has issued; far from it, deferring consideration does violence to the sound policy justifications underlying the doctrine. Thus collateral estoppel is appropriately at issue in this enforcement proceeding. As the Trade Commission itself recognizes, "Collateral estoppel is now seen as an immensely practical doctrine, rooted in considerations of fairness and the public policy favoring finality in litigation." [134] These fairness and public policy considerations, including ". . . finality to litigation, prevention of needless litigation, [and] avoidance of unnecessary burdens of time and expense[,] are as relevant to the administrative process as to the judicial." [135]

One important consideration which argues for applying collateral estoppel at this stage of the instant proceeding

[134] Supplemental Brief for Appellant on Rehearing *En Banc* (filed 31 March 1976) at 10.

[135] *A. Duda & Sons Cooperative Ass'n* v. *United States*, 495 F.2d 193, 197 (5th Cir. 1974), *quoting from Painters Dist. Council No. 38, Bhd. of Painters, Decorators and Paperhangers* v. *Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969).

is the need for a consistent and final determination of a technical oil and gas issue by *the* expert agency in the oil and gas field. Early consideration of the issue ensures that judicial and administrative resources, as well as the resources of the litigants, will not be wasted needlessly. In addition, the Trade Commission's inquiry into alleged underreporting of reserves is neither stymied nor prohibited by the District Court's "use" restriction. The only restriction is that the Trade Commission must accept the Power Commission's *factual* finding with respect to the reliability and accuracy of AGA proved reserved estimates. No administrative agency, including the Trade Commission, has carte blanche authority to reinvestigate and relitigate a factual issue simply because it disagrees with another agency's finding. The collateral estoppel doctrine serves the essential purpose of protecting the agencies, the courts, and the parties from such unnecessary and wasteful expenditures of time and money.

Endicott Johnson Corp. v. *Perkins*,[136] *Oklahoma Press Publishing Co.* v. *Walling*,[137] and other cases refusing to consider at the investigative stage certain defenses which should be raised on the merits against a formal complaint, illustrate the generally-accepted principle that courts should not interrupt the administrative process except under exceptional and narrowly-defined circumstances.

Collateral estoppel, as applied by the District Court, is easily distinguishable from the *jurisdiction* and *statutory coverage* questions dealt with in *Endicott Johnson*, *Oklahoma Press* and their progeny.[138]

[136] 317 U.S. 501 (1943).

[137] 327 U.S. 186 (1946).

[138] Such as *FMC* v. *Port of Seattle*, 521 F.2d 431 (9th Cir. 1975); *SEC* v. *Savage*, 513 F.2d 188 (7th Cir. 1975); *SEC*

First, in this case the main policy goal behind non-intervention has been fulfilled; the expert agency in the oil and gas field (the Power Commission) was allowed initially to apply its expertise and make the factual determination on which ultimate decisions will later be based. Second, in contrast to the *Endicott Johnson* line of cases, here the District Court's limited application of collateral estoppel would *not* preclude the Trade Commission from exercising its full statutory and jurisdictional authority in pursuing its investigation of possible Section 5 violations. *The District Court here did not intrude on the jurisdiction of the Trade Commission or decide a jurisdictional question of statutory coverage.*[139]

This simply is not an ENDICOTT JOHNSON*-type case. Endicott* itself dealt not with the issue of collateral estoppel, but with the question of whether the Secretary of Labor could subpoena data for the purpose of de-

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v. *Brigadoon Distrib. Co.*, 480 F.2d 1047 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *FTC* v. *Gibson*, 460 F.2d 605 (5th Cir.).

[139] This, as the Supreme Court recognized in *Oklahoma Press*, was the gravamen in both *Endicott Johnson* and *Oklahoma Press:*

> [I]n the *Endicott Johnson* case . . . [we] hold that under the Walsh-Healy Act . . . the district court was not authorized to decide the question of coverage or, on the basis of its adverse decision, to deny enforcement to the Secretary's subpoena seeking relevant evidence on that question, because Congress had committed its initial determination to [the Secretary] . . . .
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> . . .
>
> We think . . . that Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations . . . .

327 U.S. at 211 & 214.

termining if a company's activities were covered by (*i.e.*, within the jurisdiction of) the Walsh-Healy Act. *Denying enforcement of the Secretary's subpoena would have had the effect of preventing a determination of the coverage issued by the very person (the Secretary) authorized by the statute to make that determination.* Specifically, the Walsh-Healy Act directed the Secretary to make

> . . . findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor . . . shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.[140]

With this language in mind, the Supreme Court found that ". . . under the statute determination of [the coverage] issue was primarily the duty of the Secretary . . ." [141] and not the district court.[142]

Here we have no such statutory authorization; the Federal Trade Commission Act clearly does not make the estimation of natural gas reserves primarily the duty of the Trade Commission and cut out the Power Commission; nor does it make the Trade Commission's findings of fact on oil and gas matters "conclusive upon all agencies of the United States" (*i.e.*, upon the Power Commission). Quite to the contrary, the conceded expert on all technical aspects of the oil and gas industry is the

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[140] *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. at 503 (quoting from Walsh-Healy Act § 5).

[141] *Id.* at 507.

[142] *Id.*

Power Commission, not the *Trade Commission.*[143] In *So La II* the information necessary to reach a determination on the gas supply question was placed before the Power Commission, the agency most qualified to make such a determination, and that agency made specific findings of fact based on a lengthy (over 30,000 pages) and comprehensive record. Those findings are now fully available to the Trade Commission and are entitled to its respect as a matter of law and logic.

The Second Circuit's opinion in *Safir* strongly supports our position. There, in concluding that collateral estoppel was applicable to an administrative proceeding at the investigative stage, Judge Friendly pointed out that the concepts of collateral estoppel and *res judicata* differ from defenses raised in cases like *Endicott Johnson* and *Oklahoma Press*, where the respondents contended that the agencies lacked jurisdiction:

> [T]he reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect a successful party from being vexed with needlessly duplicitous proceedings . . . . *If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably* . . . . In this respect, a claim of *res judicata* differs from

[143] But even if the determination of the gas supply issue was not primarily the duty of the FPC, the Trade Commission should still be estopped from re-investigating and re-litigating (*i.e.*, collaterally attacking) the *prior* findings of fact of an equally (if not more) competent sister agency. On the facts of this case, application of collateral estoppel need not rest upon a primary jurisdiction-like policy. Indeed, before we could hold that the reserves question fell within the primary jurisdiction of the FPC (and correspondingly, outside the subject matter jurisdiction of the FTC), we would probably need to await an initial determination of this jurisdictional question by the FTC. *See Safir* v. *Gibson*, 432 F.2d at 144; *cf. Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943).

> a claim that an administrative agency has no jurisdiction over the subject matter of the investigation . . . an issue which Congress meant to be decided in the first instance by the agency itself.[144]

In accusing the writers of this dissent and the District Court of (1) attempting to discern the shape of the merits, (2) trying to divine all possible issues that could arise in the course of an FTC investigation, (3) attempting to forecast the ultimate conclusion of the FTC's proposed investigation, and (4) generally putting our cart before our horse, the Trade Commission and our colleagues repeatedly overlook the difference between res judicata and collateral estoppel, *i.e.*, the difference between *claim* preclusion and *issue* preclusion. When this difference is understood it becomes apparent how both we and the District Court are able to apply the doctrine of collateral estoppel to the facts of this case without so much as a passing glance into our crystal ball.

The FTC is fully aware of the difference between issue and claim preclusion, and it has even had occasion to admonish parties appearing before it that *collateral estoppel* precludes the redetermination of *factual issues* while res judicata forecloses entire claims or ultimate issues:

> . . . Strictly speaking the doctrine of *res judicata* refers to the merger or bar of a subsequent action based on the same cause of action as opposed to the doctrine of collateral estoppel under which the determination of a question of fact essential to a judgment is conclusive between the parties (and their privies) in a subsequent action on a different cause of action.[145]

[144] 432 F.2d at 143-44 (citations omitted) (emphasis added).

[145] *Dollar Vitamin Plan, Inc.*, 69 F.T.C. 933, 971 n.2 (1966).

Thus, *to apply the doctrine of collateral estoppel* (not the doctrine of res judicata) to the facts of this case, *we need not attempt to forecast the ultimate conclusion, or even the ultimate issue, of the FTC's proposed investigation; we need only define* ONE FACTUAL ISSUE *(the accuracy of AGA proved reserve estimates) which has already been determined by the Power Commission. The Trade Commission has a free investigative rein on* ALL ULTIMATE *issues* (*e.g.*, have appellees committed or conspired to commit an unfair trade practice; have appellees engaged or conspired to engage in a price-fixing scheme; are appellees guilty of an attempt to monopolize) and on all relevant factual issues *except* the accuracy of AGA proved reserve estimates.

Thus two recent decisions of the Sixth and Seventh Circuits, relied on by the Trade Commission, in no way conflict with our position here, nor with the decisions in *Safir* and others which we believe govern this case. In *FTC* v. *Feldman* [146] and *FTC* v. *Markin* [147] two taxicab companies argued that a *1947 holding* that they had not been engaged in interstate commerce barred the FTC from *now* investigating the industry. First, it is obvious that changed facts and changed law might justify an investigation after 29 years. In our case the Trade Commission proposes to examine the reporting of proved reserves in the same time frame as the Power Commission did. It was on precisely this point that the Seventh Circuit distinguished *Feldman* from the panel opinion in our case, with which this dissent agrees. Second, in both *Feldman* and *Markin* the private litigants sought to stop the whole investigation, *i.e.*, claim preclusion. Here the appellee producers have never sought to bar the Trade Commission investigation, they have never asserted that the Power Commission's inquiries immunized them against further investigation; they have only asserted that the Power Commission's determination of one factual issue, the accuracy of the proved reserve reporting during the same time span, must be taken as established under the doctrine of collateral estoppel, *i.e.*, *issue preclusion.*

[146] 532 F.2d 1092 (7th Cir. 1976).

[147] 532 F.2d 541 (6th Cir. 1976).

Unlike the situation in *Endicott Johnson* and similar cases, the District Court here was not making a jurisdictional determination [148] or arrogating to itself a factual determination that was primarily the duty of the Trade Commission. In accordance with well-established principles of collateral estoppel, the District Court simply applied an already-found fact to the proceedings before *it.* The court did not try the issue of underreporting itself; nor did it delve into the same conflicting materials that the Power Commission had previously considered in *So La II.* The Trade Commission was foreclosed on collateral estoppel grounds from reinvestigating and re-

[148] Regrettably, the majority opinion, at 34 n.41 and accompanying text, thoroughly confuses what it means by "these jurisdictional questions" and tries to lump in statutory coverage (jurisdiction) and collateral estoppel with the only "jurisdiction" argument the appellees made, *i.e.*, "primary jurisdiction." *Endicott Johnson* and that entire line of cases relied on by the majority deal with "jurisdiction" as referring to a statutory coverage issue, which is properly held to be decided by the responsible agency and not subject to judicial review until after the administrative proceeding is completed. *Utah Construction, Safir,* and other decisions relied on in this dissent deal with collateral estoppel by a previous factual issue determination, do not deal with statutory coverage, and hold that administrative collateral estoppel must be considered at the outset of the proceeding, else the sole purpose and benefit of the doctrine will be lost. The issue of "primary jurisdiction" relates to none of the above, has been abandoned by appellees on this appeal, and all reference to it in the majority opinion is most unfortunately misleading and confusing.

determining *this one question of fact*, not by the District Court, but by the Power Commission, a sister agency of *at least* equal competence on oil and gas matters.[149]

Likewise, the Power Commission was not arrogating to itself a factual determination that was primarily the duty of the Trade Commission. On this one question of fact, the Trade Commission simply began its investigation too late. On 24 November 1971, when these subpoenas issued, the FTC was estopped from collaterally attacking any finding of fact essential to the FPC's ratemaking determinations in *So La II* (issued on 16 July 1971). Having to accept this *one* finding of fact can have the effect of conferring antitrust and Section 5 immunity on appellees only insofar as the FTC's antitrust theories necessarily require an opposite finding. If it turns out that *all* of the FTC's antitrust and Section 5 theories do require a finding that AGA proved reserve estimates for the years 1962-1970 were *in*accurate, then the problem here is not an overly restrictive enforcement order, but a poorly aimed investigation.[150]

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[149] *Compare Endicott Johnson Corp.* v. *Perkins*, 317 U.S. at 508 and 509 where the Court found that

> . . . the District Court refused to order . . . production, *tried the issue of coverage itself*, and decided it against the Secretary.
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> . . . To perform her function [the Secretary of Labor] must draw inferences and make findings from *the same conflicting materials that the District Court considered* in anticipating and foreclosing her conclusions. (emphasis added)

[150] The Trade Commission itself has relied on something closely akin to the doctrine of administrative collateral estoppel when it works to its advantage. *See National Ass'n of Women & Children's Apparel Salesmen, Inc.* v. *FTC*, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973), where, in a collateral proceeding, the FTC relied heavily on a previous NLRB holding.

B. *Giving Collateral Estoppel Effect to a Finding of Fact Made in the Context of a FPC Ratemaking Proceeding*

As the Supreme Court made clear in *United States* v. *Utah Construction & Mining Co.*,

> *When* an administrative agency is *acting in a judicial capacity* and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.[151]

By its use of the words, "[w]hen . . . acting in a judicial capacity," we do not believe the Court intended to engraft on the doctrine of administrative collateral estoppel the drastic restrictions advocated by the Trade Commission. The fact that the Power Commission's ratemaking proceeding in *So La II* was "quasi-judicial" in nature, rather than purely "judicial", does not mean that the facts found therein are not entitled to collateral estoppel effect.

The crucial, threshold requirement for any application of collateral estoppel is a truly adversary proceeding, i.e., a proceeding sufficiently adverse to guarantee that opposing interests are adequately represented and that the facts established can withstand the test of opposition. When facts are established as a result of the adversary process (*i.e.*, when they have been challenged and controverted by opposing interests), they acquire an added dimension of respectability and are therefore accorded a binding effect on parties (and their privies) in subsequent proceedings. If there is no adversariness in a proceeding, then there is no assurance that the facts have been truly established; the facts found may well be inaccurate since they have not been tested by an opposing interest. We submit that so long as there is sufficient adversariness in a quasi-judicial, ratemaking

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[151] 384 U.S. at 422 (emphasis added).

proceeding, the necessary guarantee of trustworthiness is present. Accordingly, the facts found therein should be given collateral estoppel effect.

There is little room to quarrel over the adversariness of the Power Commission's proceedings in *So La II*. All evidence was developed in an adversarial environment with public and private parties representing sharply opposing interests participating at all stages.[152] Witnesses were subjected to rigorous cross-examination, and an opportunity for rebuttal testimony or rebuttal evidence was provided.[153] Based on this record, the Power Commission's staff concluded in its initial brief in *So La II* that ". . . the validity and reliability of the reported AGA reserves data [was established] beyond any reasonable doubt." [154] In *So La II* itself the Power Commission specifically

[152] As mentioned earlier, a group of municipal distributor intervenors played a very active role in the proceedings. *See So La I*, 428 F.2d at 414 & n.3.

[153] *See So La II*, 46 F.P.C. at 113 & 115. Examination of the transcript in *So La II* (admitted into the record of these proceedings by stipulation, App. III at 620a-21a) indicates that witnesses were vigorously cross-examined on the reliability of AGA data and the procedures used in the FPC's independent NGRS audit. *See* Transcript of *So La II* at 4126-61, 4170-93, 4303-34, & 4652-4753. The FPC staff members in charge of the NGRS audit appeared, testified in detail, and were cross-examined on the methods and procedures followed in performing the audit. *See* Transcript of *So La II* at 5190-5207A & 5421-72. Other oil and gas experts on the FPC staff testified and were cross-examined on the reliability of AGA reserve data. *See* Transcript of *So La II* at 4003, 4055, 4074-75, 4132, 4137, & 4166..

[154] Brief Reprinted in *Hearings on Concentration by Competing Raw Fuel Industries in the Energy Market & Its Impact on Small Business Before the Subcomm. on Special Small Business Problems of the House Select Comm. on Small Business*, 92d Cong., 1st Sess. at A72 (1971) (hereinafter *1971 House Concentration Hearings*).

found that the AGA reserve estimates had not been "impeached or substantially contradicted" [155] and that they were "reasonably reliable" for ratemaking purposes.[156] This area rate proceeding, bringing together as it did sharply divergent economic interests in the same arena to do battle, provided an excellent context in which to determine finally the accuracy of AGA proved reserve estimates.

Discussing the problem of how and where to draw the line between "judicial" and "nonjudicial" action for purposes of collateral estoppel and res judicata, Professor Davis in his *Administrative Law Treatise* suggests,

> The best approach is to avoid the labels that have been attached to various functions for other purposes and to determine what is judicial or nonjudicial for purposes of res judicata by emphasizing factors which relate to res judicata. For instance, the Supreme Court has held that because the granting of broadcasting licenses is nonjudicial, that function cannot be vested in the Supreme Court. But a function may be nonjudicial for one purpose and judicial for another purpose. The Supreme Court's holding that a court ought not to grant and deny licenses may be entirely sound, for practical reasons relating to qualifications, and it is natural for the court to say in such a context that the function is nonjudicial. But *if an agency having the licensing power conducts a full hearing and adjudicates a controversy about past facts concerning the applicant, the determination should ordinarily be res judicata;* for want of a better set of terms, the conclusion may even be announced that the action is deemed judicial. The question is not what is judicial in the abstract or for some other purpose. The question is whether considerations relating to res judicata require that

[155] 46 F.P.C. at 113.

[156] *Id.* at 116.

> the particular action be regarded as judicial or nonjudicial.[157]

Like the FCC in Professor Davis' example, the Power Commission in *So La II* conducted a full hearing and adjudicated a controversy about past facts concerning appellees. Hence, the Power Commission's findings of fact with respect to that controversy are entitled to collateral estoppel effect. *For purposes of administrative collateral estoppel, the only litmus test is adversariness (*I.E., *a* FULL *hearing adjudicating a* CONTROVERSY *about past facts), not whether the administrative proceeding is labeled "licensing" or "ratemaking".*

As this court has recognized on prior occasions, there is no clear, bright line between adjudicative (judicial) proceedings and rulemaking (legislative or nonjudicial) proceedings. On one side of this coin is our decision in *Mobil Oil* v. *FPC;*[158] on the other side our decision today. In *Mobil Oil* we recognized that even in a legislative rulemaking proceeding under APA § 553, the circumstances of the case might call for "some kind of hearing."[159] Today, however, the majority refuses to recognize that where there is sufficient adversariness in a quasi-judicial, ratemaking proceeding, the principles of collateral estoppel should apply in the same way they do in pure judicial proceedings. In *Mobil Oil* the requirement of "some kind of hearing" derived from the circumstances of the case; here the application of collateral estoppel should derive from the circumstances of this case—the adversariness of the hearings in *So La II.*

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[157] *K. Davis, Administrative Law Treatise,* § 18.08 at 598 (1958) (footnote omitted and emphasis added).

[158] 483 F.2d 1238 (D.C. Cir. 1973).

[159] *See* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267 (1975).

In a suit for refund of income taxes paid upon a deficiency assessment the Fifth Circuit has given collateral estoppel effect to a prior Internal Revenue Service determination letter revoking a taxpayer's tax-exempt status.[160] Despite the fact that an IRS determination letter bears little resemblance to a "judicial" proceeding, the court held that ". . . the revocation of appellee's exemption must be considered a judicial act *for the purpose of res judicata.*"[161] Factors influencing the Fifth Circuit's decision included, *inter alia,* finality to litigation, prevention of needless litigation, and avoidance of unnecessary burdens of time and expense; that the agency's action was directed specifically at the taxpayer and was not a general rule applicable to all organizations of a given class; that the agency's action had an immediate effect upon the status of the taxpayer; and that the taxpayer was well-informed of the progress of the agency's proceedings.[162]

These same factors militate in favor of giving the findings of fact in *So La II* collateral estoppel effect. There, in a proceeding bearing all the hallmarks of the adversary system, the issue of the accuracy of the AGA proved reserve estimates was fully considered and finally determined.

C. *Giving Collateral Estoppel Effect to a Finding of Fact Made for Ratemaking Purposes*

In *So La II* the Power Commission specifically found that ". . . the AGA reserve data is reasonably reliable

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[160] *A. Duda & Sons Cooperative Ass'n* v. *United States,* 495 F.2d 193 (5th Cir. 1974).

[161] *Id.* at 197 (emphasis added).

[162] *Id.*

for the purposes used herein." [163] The Trade Commission interprets this to be a statement intended to limit and qualify the Power Commission's acceptance of the AGA data. Taken as a whole, the record in *So La II* clearly does not support this inference. In fact, in its initial brief in *So La II* the FPC staff concluded that ". . . the record establishe[d] the validity and reliability of the reported AGA reserves data beyond any reasonable doubt." [164] Furthermore, the statement "for the purposes used herein" can just as easily be taken on the positive side to mean that these figures are good enough *even for* the FPC's use in calculating just and reasonable rates, or it can be taken as a relatively meaningless and gratuitous expression intended to have no substantive effect whatsoever. Whatever its meaning, we doubt seriously that the Power Commission intended it to limit the subsequent collateral estoppel effect of the finding it precedes.

Arguing along this same line, the Trade Commission makes much of the fact that the ultimate purpose of its investigation (determining if there has been a violation of Section 5 of the FTCA) differs from the ultimate purpose of *So La II* (determining the just and reasonable area rate for the Southern Louisiana area). However, since the FTC now seeks to determine whether the producers are underreporting reserves and are thereby violating the FTCA,[165] we must agree with appellees that

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[163] 46 F.P.C. at 116 (emphasis added).

[164] *See 1971 House Concentration Hearings* at A56. *See also id.* at A72.

[165] In its supplemental reply brief the FTC states,

> This case touches upon two distinct questions which the companies repeatedly confuse or fail to distinguish: is there a natural gas shortage, and have natural gas companies taken action having the purpose or effect of misstating the extent of any such shortage? The questions

any distinction based on different ultimate purposes is purely illusory. No matter how ingenious or how far-fetched it is, *any antitrust or unfair trade practice theory must have at its core an illegal activity having some effect (or at least some intended effect) on area rates.*[166] Hence,

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> are related but independent. While the first question is of primary concern to the FPC, the second is the one of particular concern to the FTC.

Reply Supplemental Brief for Appellant on Rehearing *En Banc* (filed 13 April 1976) at 2. We agree with the FTC; the purpose of their investigation is to determine whether appellees have ". . . taken action having the purpose or effect of misstating [*i.e.*, exaggerating through underreporting] the extent of any . . . shortage." *See also id.* at 14 where the FTC explains, "If a complaint were at issue, for example, the FTC (more particularly its staff) would be the proponent of a claim that some of the companies had engaged in concerted activities *to underreport their proved reserves.*"

Thus, if the FTC investigation is on *reporting* or *misstating*, then the FTC's only concern is with *proved* reserves, because these are the only reserves reported or about which statements have ever been made. (See our discussions of Relevance, Part IV, *supra*.)

[166] In its supplemental brief on rehearing en banc, the FTC virtually concedes this point with the following admission:

> We do not dispute that one of the causes for the FTC's concern about the possibility of unlawful conduct concerning the reporting of reserves is that such conduct might result in artificial understatement of reserves which, because of the FPC's reliance upon such data, could result in higher rates.

Supplemental Brief for Appellant on Rehearing *En Banc* (filed 31 March 1976) at 28-29. The Trade Commission then goes on to claim another "cause for concern":

> [I]t is quite possible that one or more of the companies has engaged in conduct concerning their development and reporting of reserves which has not yet sufficiently ripened so that it would have caused the AGA data to be substantially inaccurate . . . . Similarly, one or more

the Power Commission's finding of reliability, even if for ratemaking purposes only, cannot be nonchalantly brushed aside as a limited and irrelevant factual determination. While this was indeed a finding of fact made for ratemaking purposes, *it was nevertheless a determination that the only estimates (i.e., AGA proved reserve data) which could possibly affect rates were reliable and accurate.* (We repeat: since the only supply estimates relied upon by the Power Commission are AGA proved reserve estimates, *only* these data can *ever* affect the rates set by the Commission.)

For basically the same reasons, the majority's reliance on *United States* v. *RCA* [167] is misplaced. In *RCA* the broadcasting company argued that the Federal Communications Commission's prior approval of its agreement to

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of the companies may have attempted to engage in such unlawful conduct without success . . . .

Id. at 29 (footnote omitted). This second alleged "cause for concern" is totally fallacious for at least three reasons. *First,* only *proved* reserve estimates are ever reported and the FTC does at least concede that its investigation is aimed in part at ". . . the possibility of unlawful conduct concerning the *reporting* of reserves . . . ." (Emphasis added.) *Second,* since the only reserve data relied upon by the FPC are AGA proved reserve estimates, only these figures can ever have any effect on FPC-determined rates. *Third,* as we have painstakingly demonstrated in section IV *supra,* there is *no correlation whatsoever* between *proved* reserve estimates and the earlier, speculative, *non*proved reserve estimates. After drilling (and the immediately following determination whether any *proved* reserves are present), all former *non*proved reserve estimates become superseded, irrelevant, and probably misleading. Without some nexus between AGA *proved* reserve estimates and other *non*proved reserve data, the FTC's allegation that the producers may be engaged in ". . . conduct that may eventually affect, but has not yet affected, proved reserves data" makes utterly no sense.

[167] 358 U.S. 334 (1959).

exchange a television station in Cleveland for one in Philadelphia immunized that agreement from a future antitrust attack by the Justice Department. In other words, the broadcasting company urged the court to give res judicata or collateral estoppel effect to the FCC's determination that this agreement was "in the public interest" (the ultimate issue before the FCC). Here, appellees are not asking this court to give res judicata or collateral estoppel effect to the FPC's ratemaking determination (the ultimate issue in *So La II*); nor do they claim any immunity from the antitrust laws or the FTCA. The accuracy of AGA proved reserve data was a factual issue in controversy in *So La II,* and it is only *this one factual issue,* not appellees' antitrust or Section 5 liability, which the FTC is estopped from re-investigating and redetermining. In *RCA* there was no finding of fact by the FCC on the antitrust question which concerned the Justice Department; nor could there have been since the FCC was not authorized to decide antitrust issues as such.[168] Here, in comparison, there was a finding by the FPC on a factual issue concerning the FTC. Additionally, there can be no contention here that the FPC, *the* expert agency on oil and gas matters, was not empowered to determine the accuracy of the AGA proved reserve estimates.

In its supplemental reply brief on rehearing en banc, the FTC takes one final desperate stab at a "ratemaking purposes" argument, asserting that "factual determinations in ratemaking proceedings are not 'final' even

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[168] In *RCA* the Supreme Court concluded,

> [T]he legislative history of the [Federal Communications] Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.

Id. at 346.

among the parties, and hence are not entitled to be the basis for applying collateral estoppel in other contexts." [169] Unfortunately, the FTC overstates its case. As the Trade Commission itself recognizes in the sentence that immediately precedes this statement, the only case in point [170] indicates that ". . . an agency is ordinarily free . . . to reconsider factual determinations *in the light of new evidence*. . . ." [171] Thus, on factual issues (*e.g.*, the accuracy of AGA proved reserve data) the FPC can change its mind *if new evidence or changed circumstances arise.*[172] But this observation applies with equal force to the factual determinations of a *judicial* proceeding. Accordingly, it does not preclude application of collateral estoppel in either context. If it did, no factual determination, be it administrative or judicial, could ever be given collateral estoppel effect.

VII. Confidentiality and Production at Situs

The District Court attached the following conditions to the disclosure of documents designated as confidential:

(1) The Secretary of the Federal Trade Commission is designated the custodian of the documents;

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[169] Reply Supplemental Brief for Appellant on Rehearing *En Banc* (filed 13 April 1976) at 8.

[170] *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420 (1930).

[171] Reply Supplemental Brief for Appellant on Rehearing *En Banc* (filed 13 April 1976) at 8 (emphasis added).

[172] Of course, on *policy* matters affecting the ultimate issue in its ratemaking proceedings (the just and reasonable area rate for gas), the FPC is always free to change its mind according to its current perception of "the public interest." This, however, does not preclude application of collateral estoppel to underlying findings of fact essential to a determination of the ultimate issue.

(2) The documents (and presumably any documents or memoranda derived therefrom) must be kept in a depository with access restricted to the FTC employees assigned to the investigation;

(3) Documents can only be removed from the depository or used for other purposes with the court's permission; and

(4) Upon the termination of the investigation, the documents (and presumably all copies of documents) must be returned to their owner.[173]

The Trade Commission does not question the confidential nature of the documents it seeks disclosed. Rather, its position is that the FTCA and the Commission's Rules of Practice provide appellees with adequate protection. *Quite to the contrary*, the FTCA and the Rules of Practice merely state that the *public disclosure* of geophysical data or information and trade secrets *is within the discretion* of the Commission. The FTC's rules governing *in camera* orders, the release of confidential information, and requests for disclosure of records clearly indicate that the Trade Commission will decide ultimately whether records exempt from disclosure under the Freedom of Information Act (as most of these records probably would be) will be disclosed.[174]

The District Court was not required to rely on the unbounded discretion of the Trade Commission to keep the producers' estimates confidential.[175] In addition, we

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[173] Six-Company Order, App. IV at 809-10a (¶ 8); Superior Order, App. III at 469a-71a.

[174] 16 C.F.R. §§ 3.45, 4.10 & 4.11 (1976). *See also* 15 U.S.C. § 46(f) (1970).

[175] See note 3 *supra*. The action of the Trade Commission, in acceding to the telephoned demand of a Congressman for immediate access to the documents in so short a period of time as to preclude resort to a court, underlines the wisdom

fail to see how the minor protective procedures fashioned by the court will impose any substantial burden on the FTC's investigation [176]—especially since the parties have agreed that this portion of the court's order may be modified by the addition of the following provisos:

> *Provided that*, nothing in this order shall prohibit disclosure of materials produced by respondents to commissioners of the FTC in connection with the performance of said commissioners' official functions; nothing in this order shall prohibit employees of the Trade Commission from referring to or relying on any of the materials produced by respondents in connection with the presenting of any recommendation to the Trade Commission for or against issuance of a complaint; and nothing in this order shall prohibit the Trade Commission from referring to or relying on any of the materials produced by respondents in connection with any determination for or against issuance of any complaint based on such materials. (¶ 8(a))
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> In the event the Trade Commission desires to release any confidential material, it shall so notify

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and reasonableness of the District Court's protective order on confidentiality. The Federal Rules on Civil Procedure currently provide for motions to quash duly authorized subpoenas, but not telephone calls.

[176] In order to protect confidential commercial information and trade secrets, District Courts frequently have required appropriate protection as a precondition to enforcement of FTC investigative subpoenas. *See, e.g., FTC* v. *St. Regis Paper Co.*, 304 F.2d 731, 732 n. 1 (7th Cir. 1962); *Graber Mfg. Co.* v. *Dixon*, 223 F. Supp. 1020 (D.D.C. 1963); *FTC* v. *Bowman*, 149 F.Supp. 624 (N.D.Ill.) *aff'd*, 248 F.2d 456 (7th Cir. 1957); *FTC* v. *Menzies*, 145 F.Supp. 164, 171 (D.Md. 1956), *aff'd*, 242 F.2d 81, 84 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957). *Accord, FTC* v. *Lonning*, 539 F.2d 202 (D.C. Cir. 1976).

> the Court and each affected respondent, specifying the material it desires to release, and each such respondent may, within ten days of receipt of such notice, file with the Court opposition to such release. The respondents shall bear the burden of proving the material is entitled to confidential treatment upon notice that the Trade Commission intends to release any such material. No such data may, however, be released until this Court shall enter its order permitting such release. (¶ 8(b))
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> *Provided that*, in the event the Trade Commission issues a formal complaint, at the conclusion of the investigation, the confidential material produced by respondents may be offered and received in evidence in the complaint proceeding, provided that each affected respondent shall be given opportunity to request appropriate confidential treatment of such material. (¶ 8(c)) [177]

We would adopt these modifications (as the majority opinion does to some extent, *e.g.*, the ten day notice requirement) and hold that the District Court did not abuse its discretion when it attached the conditions listed above to the disclosure of information by all seven appellees.

The Trade Commission also complains about the option permitting the production of documents for inspection where they are stored. The Supreme Court in *CAB* v. *Herman* upheld the enforcement of a subpoena "with appropriate provisions for assuring the minimum interference with the conduct of the business of respondents." [178] The Second Circuit has also upheld a similar provision. It noted that "[r]equiring records to be produced away from the place where they are ordinarily kept may im-

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[177] Six-Company Stipulation (filed 19 May 1976) at 3-4.

[178] 353 U.S. 322, 323 (1957).

pose an unreasonable and unnecessary hardship which in itself would make the issuance of the subpoena, otherwise proper, arbitrary and capricious." [179] Since the number of documents to be produced will be quite large, it is not inappropriate to relieve appellees of some of the expense and burden entailed by permitting them the option of producing documents where they were stored [180] and requiring the Trade Commission to copy and transport to Washington any documents they consider useful. Adding the one agreed-upon modification, we would affirm the District Court's *in situs* restriction.

VIII. The Superior Order

The Commission concedes that *Superior does not report reserve estimates to, or participate in, the work of the AGA*. Since the FTC issued identical subpoenas to all producers, it was obvious to the District Court that several specifications, those relating to *reporting* and *participating* in the AGA, were *not relevant* to Superior. As a result, the District Court simply refused to enforce specifications G through J. In all other respects, the court

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[179] *Walling* v. *American Rolbal Corp.*, 135 F.2d 1003, 1005 (2d Cir. 1943).

[180] The Trade Commission's and the majority's arguments notwithstanding, it is common for a district court to require the administrative agency to inspect subpoenaed records or documents at the place where they are stored. *NLRB* v. *Friedman*, 352 F.2d 545 (3d Cir. 1965); *Hunt Foods & Indus., Inc.* v. *FTC*, 286 F.2d at 812; *FTC* v. *Bowman*, 149 F.Supp at 630; *FTC* v. *Menzies*, 145 F.Supp. at 171. In addition, the parties have agreed that

> . . . each company shall designate no more than one corporate office in each state in which documents located within that state shall be produced for inspection and copying.

Six-Company Stipulation (filed 19 May 1976) at 3.

required Superior to provide the Commission with the same documents and information that were being required of the other six producers, and subject to the same confidentiality protections previously discussed. We do not understand, and the majority opinion does not bother to explain, how this logical factual determination can be viewed as clearly erroneous.

IX. Conclusion

The preceding pages set forth in detail our differences with the majority opinion. In our view, the majority is not only wrong in its evaluation of the details of this case and in its misconception of the economic facts of life in the gas industry, but, more importantly, the majority has abandoned any standard of appellate review of the factual determinations of a trial court in proceeding to enforce an administrative subpoena.

It cannot be denied that questions of relevance and burdensomeness are peculiarly within the ken of the trial court, and the recognized standard is that the district court's findings are to be upset only if they represent clear error or an abuse of discretion. The majority apparently feels this standard would be too restrictive of what it is resolved to do. So, instead, it cavalierly labels the trial court's findings of fact as questions of law and proceeds to substitute its judgment for that of the trial court.

Our concern over the majority's approach thus derives, not from a disagreement over the application of the accepted standard of appellate review to the particular factual setting in this case, but rather from a more basic apprehension over the consequences of the undefined standard of review which was employed.

The majority has engaged in a standardless, directionless review in this case, and no euphemism can disguise

this embarrassing fact. The majority opinion demonstrates this assertion by failing to even define the purpose of the FTC investigation which is being subjected to de novo review, although the trial court had elucidated this quite well from FTC counsel, taking the original "We're Going to Investigate the Gas Industry" resolution of the FTC as a beginning. The precedents clearly establish this definition of purpose as the starting point for analysis; if the majority chooses to disregard these precedents, the dictates of logic should serve as an adequate substitute. The failure to focus on the FTC's purpose in turn causes the majority to roam into those areas committed by precedent to, and more appropriate for, the district court. A particularly striking example of this is to be found in the majority's decision to ignore the scientific and economic realities of the gas industry which the District Court correctly took into account.

The enlarged role which the majority has assigned to this court in this case distorts the proper relationship between the federal agencies, the federal trial courts, and the federal appellate courts. In so doing, the majority sets a pernicious precedent for future trials *de novo* which would leave the Court of Appeals as the primary determinant of factual matters more properly suited for the District Court.

The strength of this sloppy precedent is, of course, weakened by the composition of the *en banc* court in this case; here the majority consists of only four of our colleagues. It is our hope that the approach adopted by this diminished majority of the court will not be carried over into future cases. If it is attempted to be so applied in the future, it will be a divergence from accepted practice of such magnitude that a close examination by our full court will be warranted, if the errors of our four colleagues have not already received their just reward from an even higher authority.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Term, 1976

[Filed March 24, 1977]

No. 74-1547

FEDERAL TRADE COMMISSION,
Appellant,

v.

TEXACO, INC.

(Civil 1089-73)

and Consolidated Case Nos. 74-1548, 74-1549, 74-1550, 74-1551, 74-1553, 74-1554

Appeals from the United States District Court for the District of Columbia

Before: BAZELON, Chief Judge, WRIGHT, LEVENTHAL, ROBINSON, MACKINNON and WILKEY, Circuit Judges

ORDER

Upon consideration of the motion of appellant Federal Trade Commission for clarification of the Opinion for the Court filed in this proceeding on February 23, 1977, of the joint response of appellees thereto, and of appellant's reply memorandum, it is

ORDERED, by the Court, that the Opinion for the Court be, and it hereby is, amended by adding a footnote on Page 44 thereof following the words "to do so."

in line 3, to be designated footnote 64, and which shall be and read as follows:

> "The Court is not herein adopting a rule of general applicability for a 10-day notice provision. It is rather adopting for purposes of this case a proposal for confidentiality advanced by FTC, even though this was put as a basis for settlement and no settlement was reached.
>
> It should be noted that the settlement conference was initiated by this court. Pursuant to an order of this Court dated April 21, 1976, counsel for the FTC and Superior conferred for the purpose of seeking agreement as to the issues which still divided them on this appeal. On May 19, 1976, these parties filed a Stipulation with the court, indicating that they were "unable to agree on any modifications of the district court's order of March 22, 1974, concerning Superior which would eliminate or narrow the issues remaining for decision by this Court." Attached to this Stipulation was a document entitled "FTC's Statement of Issues and Proposed Modifications," which included certain "modifications the FTC is willing to accept but which Superior Oil Company ('Superior') has not agreed to." Paragraph 9 of this latter document, which sets forth the modifications of the district court's confidentiality protection that the FTC was "willing to accept," reads as follows:
>
> > Subject to the exceptions set forth below, the FTC will not disclose any of the documents produced which Superior designates confidential to any person outside the employ of the FTC (other than an outside consultant retained by the FTC who has agreed not to disclose the documents) without first giving Superior ten days' notice of its intention to do so.

> > (a) With respect to an official request for such documents from a committee or subcommittee of Congress or a court (by compulsory process), the FTC will advise the Congressional committee or subcommittee or the court that Superior considers the material to be confidential, and will give Superior ten days' prior notice where possible, and in any event, as much advance notice as can reasonably be given, before releasing or granting access to the documents. [footnote omitted]
>
> > (b) The above notice provisions shall not apply to any information which (1) is now in the public domain; (2) enters the public domain from a source other than the FTC or its employees; (3) was in the FTC's possession prior to disclosure to the FTC by Superior; or (4) is supplied to the FTC or its employees by a third party lawfully in possession thereof.
>
> > (c) In the event that the investigation with respect to which the subpoena issued results in issuance of an adjudicative complaint, the confidential status of the documents and the limitations on their disclosure shall be governed solely by the applicable provisions of the FTC's Rules of Practice, Part 3—Rules

And it is

FURTHER ORDERED, by the Court, that the footnotes on pages 44 and 45 of the Opinion for the Court, heretofore designated footnotes 64, 65 and 66, be, and

they hereby are, renumbered as footnotes 65, 66 and 67, respectively.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judges MacKinnon and Wilkey did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

[Filed April 1, 1977]

No. 74-1547

FEDERAL TRADE COMMISSION,
Appellant

v.

TEXACO, INC.

Civil 1089-73
and Consolidated Case Nos. 74-1548 74-1551
74-1549 74-1553
74-1550 74-1554

BEFORE: Bazelon, Chief Judge; Wright, Leventhal, Robinson, MacKinnon and Wilkey, Circuit Judges

ORDER

Upon consideration of appellees' motion for a stay of the Court's mandate and for a stay of the Court's enforcement order, and of the opposition of appellant Federal Trade Commission thereto, it is

ORDERED by the Court that appellees' motion is granted insofar as it requests a stay of the issuance of the mandate for a period of thirty days, and the Clerk

is directed not to issue the mandate in this case prior to April 18, 1977.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 74-1547, 74-1548, 74-1550,
74-1551, 74-1553, 74-1554

FEDERAL TRADE COMMISSION,
Appellant,

v.

TEXACO INC., et al.,
Appellees.

STIPULATION RE ISSUES ON WHICH PARTIES HAVE AGREED AND ISSUES WHICH REMAIN TO BE RESOLVED BY THE COURT

WHEREAS, this Court has ordered the parties to confer for the purpose of seeking an agreement on (1) those issues as to which there is no further need for this Court to intervene; and (2) those issues which remain to be resolved by this Court in the above-captioned Federal Trade Commission ("Appellant") subpoena enforcement proceedings regarding certain subpoenas issued in the course of a Commission investigation into natural gas reserve estimate reporting procedures (FTC Investigation File No. 711 0042);

WHEREAS, the parties have met on May 5 and 12, 1976, and have discussed the issues remaining in this case pursuant to the Court's Order; and

WHEREAS, the Appellant, on the one hand, and Texaco Inc., Standard Oil Company (Indiana), Exxon Corporation, Shell Oil Company, Standard Oil Company of California, and Mobil Oil Corporation (collectively referred to hereinafter as "Appellees"), on the other hand, have reached agreement as to certain issues which need

not be decided by the Court on this appeal, have agreed to narrow other issues but continue in disagreement as to some issues which remain for resolution by the Court;

A. IT IS HEREBY STIPULATED AND AGREED by and between Appellant and Appellees that neither party has any objection to the first sentence of paragraph 1, paragraph 5, subparagraph 8(d) and paragraph 9 of the Order.[1] (517 F.2d at 160, 161, 162.)

B. APPELLEES HAVE PROPOSED AND THE APPELLANT HAS AGREED, without prejudice to the Appellant's position that the Order should be vacated or further modified, and without prejudice to Appellees' position that the Order should be affirmed, as follows:

1. Subparagraph 2(a) of the Order (517 F.2d at 160) may be modified by addition of the following proviso:

> "*Provided that*, to the extent otherwise called for, any and all proved reserve data contained in bid calculation files and relating to tracts covered by subparagraph 2(c) shall be produced."

2. Subparagraph 2(c) of the Order (517 F.2d at 160) may be modified by addition of the following proviso:

> "*Provided that*, where a respondent had no ownership interest in a field but nevertheless an employee of such respondent had reporting responsibility to the Southern Louisiana Subcommittee of the American Gas Association Committee on Natural Gas Reserves for such field, production by such respondent shall also include data otherwise called for as to each field for the period when such reporting responsibility existed."

---

[1] "Order" as used herein refers to the order entered by the District Court on March 22, 1974, as modified by the opinion of the panel of the Court of Appeals (reported at 517 F.2d at 137-62).

3. Subparagraph 3(b) of the Order (517 F.2d at 161) may be modified by addition of the following proviso:

> "*Provided that*, this subparagraph shall not be construed to exclude internal documents, *i.e.*, documents generated and/or circulated solely within one company."

4. Paragraph 7 of the Order (517 F.2d at 161) may be modified by addition of the following proviso:

> "*Provided that*, each company shall designate no more than one corporate office in each state in which documents located within that state shall be produced for inspection and copying."

5. Subparagraph 8(a) of the Order (517 F.2d at 161) may be modified by addition of the following proviso:

> "*Provided that*, nothing in this order shall prohibit disclosure of materials produced by respondents to commissioners of the FTC in connection with the performance of said commissioners' official functions; nothing in this order shall prohibit employees of the Trade Commission from referring to or relying on any of the materials produced by respondents in connection with the presenting of any recommendation to the Trade Commission for or against issuance of a complaint; and nothing in this order shall prohibit the Trade Commission from referring to or relying on any of the materials produced by respondents in connection with any determination for or against issuance of any complaint based on such materials.

6. Subparagraph 8(b) of the Order (517 F.2d at 161) may be modified by addition of the following qualifying language:

> "In the event the Trade Commission desires to release any confidential material, it shall so notify the

Court and each affected respondent, specifying the material it desires to release, and each such respondent may, within ten days of receipt of such notice, file with the Court opposition to such release. The respondents shall bear the burden of proving the material is entitled to confidential treatment upon notice that the Trade Commission intends to release any such material. No such data may, however, be released until this Court shall enter its order permitting such release."

7. Subparagraph 8(c) of the Order (517 F.2d at 161-62) may be modified by addition of the following proviso:

"*Provided that*, in the event the Trade Commission issues a formal complaint, at the conclusion of the investigation, the confidential material produced by respondents may be offered and received in evidence in the complaint proceeding, provided that each affected respondent shall be given opportunity to request appropriate confidential treatment of such material."

C. APPELLANT HAS PROPOSED AND APPELLEES HAVE AGREED, without prejudice to Appellees' position that the Order should be affirmed, and without prejudice to Appellant's position that the Order should be vacated and further modified, as follows:

1. The Order may be affirmed insofar as it excludes raw field data, subject to the FTC's right to seek access to or production of such data pursuant to paragraph 9 of said Order;

2. The Order may be modified to expressly exclude maps or other documents relating to the suspected location of natural gas in currently unleased acreage.

D. APPELLANT AND APPELLEES HAVE BEEN UNABLE TO AGREE upon certain issues which remain

to be resolved. Appellant contends that the Order should be vacated and that the subpoena should be enforced as issued, subject only to the limitations set forth in Part C above and in the attached Appendix A. Appellees contend that the Order should be enforced as modified by the provisions contained in Part B and C above. Appellant's statement of issues remaining to be resolved is attached as Appendix A. Appellees' statement of issues remaining to be resolved is attached as Appendix B.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1547; 74-1548;
74-1550; 74-1551;
74-1553; 74-1554

FEDERAL TRADE COMMISSION,
Appellant,

v.

TEXACO INC. ET AL.,
Appellees.

APPENDIX A: FTC'S STATEMENT OF ISSUES AND PROPOSED MODIFICATIONS NOT AGREED TO BY COMPANIES

This Appendix sets forth the respects in which the FTC believes that the district court's order of March 22, 1974 ("said Order"), as modified pursuant to the Stipulation of the parties dated May 19, 1976, still presents issues requiring decision by the Court (see paragraphs 1-13). It also sets forth additional modifications the FTC is willing to accept, but which the Companies have not agreed to (paragraphs 15-19).

1. There is an issue about the district court's rulings in the first unnumbered paragraph of said Order (a) that the FTC's subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the FTC to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission, and (b) that the subpoenas are improper in other respects as well and should not be enforced as issued. The FTC believes these rulings were erroneous.

2. There is an issue about the limitation in paragraph 2(a) to "proved" natural gas estimates. The FTC believes that the Companies should have been required to produce other types of estimates, regardless of how they are denominated, including "probable," "possible" and "speculative" as defined by the Potential Gas Committee, which categories have been recognized by counsel for the Companies in these cases (*e.g.*, App. II 438a-441a).

3. There is an issue about the exclusion in paragraph 2(a) of bid calculation data and bid calculation files, and about any limitation of production to estimates of proved reserves contained in such data or files. The FTC believes that the Companies should have been required to produce with respect to all types of reserve estimates contained in bid files.

4. There is an issue about the limitation of paragraph 2(a) to specified types of immediate data used to make the estimates to be submitted. The FTC believes that except for raw field data the Companies should have been required to produce the documents called for in Specifications G, H and I.

5. There is an issue about the limitations of paragraph 2(b). The FTC believes that the Companies should have been required to produce aggregate reserve estimates for the areas described in Specification G(1) and (2) of the subpoena and field or leasehold estimates as called for by Specification G(3). As to the latter, production should not have been limited to a sample or to fields included in reports for 1971. Rather, production should have covered all fields, whether or not they were reported in 1971 or any other year.

6. There is an issue about the limitation in paragraph 2(c) to fields in which the company had an ownership interest as of the date reports for 1971 were made. The FTC believes that the Companies should have been

required to produce with respect to estimates for fields owned at prior times and for fields in which the company did not have or acquire an ownership interest.

7. There is an issue about the limitations of paragraph 2(d) upon the purposes for which the FTC may use the documents produced. The FTC believes it should be free to use the documents for any purposes within the scope of the resolution authorizing the investigation, which is not limited to determining "whether there is a conspiracy in the reporting of natural gas proved reserve estimates," or otherwise within its authority, and in particular that it should not be limited in using the documents "to investigate or determine the amount of proved natural gas reserves."

8. There is an issue about the limitations of paragraph 3(a) to estimates for "Offshore Southern Louisiana," and to those for fields included in reports for 1971. The FTC believes that production should have been required without limitation as to area and even if the field was not included in the reports for 1971.

9. There is an issue about the limitations in paragraph 3(b) even if modified pursuant to the Stipulation to include internal company documents. Although the parties are in agreement with the panel's modification of the time period set forth in paragraph 2, the panel did not expressly deal with the other time limits in said Order. The FTC believes that production should have been required for the period 1962-1971 as set forth in Specification K, and not just for the period 1966-1971. In addition, the FTC believes that production should not have been limited to documents that were exchanged or constitute, contain or refer to any agreement, arrangement or communication among the Companies or others, but should have included all documents that relate to the subject set forth in Specifications J and K, even if they appeared to involve no other company.

10. There is an issue about the limitation of paragraph 4 to persons who acted with respect to proved reserve estimates. The FTC believes that the Companies should be required to produce with respect to all types of estimates and activities and for the time periods set forth in Specification L.

11. There is an issue about paragraph 6 in that the FTC believes that 180 days to comply, instead of the 30 or more days allowed by the subpoena, is an unduly long period.

12. There is an issue about the option given to the Companies under paragraph 7 to produce at the corporate or field locations where the documents are normally maintained rather than at the FTC office in Washington, D.C., even if each company is limited pursuant to the Stipulation, to one of its officers in any given state. The FTC believes that production in Washington, D.C., should have been required, absent some agreement between the FTC and a company.

13. There is an issue about the confidentiality limitations of paragraph 8(a)-(c) of said Order, even if modified as set forth in paragraph B of the Stipulation. The FTC believes that no such limitations should have been imposed. As stated in its Supplemental Reply Brief and during oral argument, the FTC agrees that, if the Court believes that there is a sufficient problem as to confidentiality to warrant protection beyond that normally available, paragraphs 8(a)-(c) may be replaced by a provision requiring that, with respect to documents produced under the order and designated confidential by the company, the FTC will not disclose such documents to any person outside the employ of the FTC (other than an outside consultant retained by the FTC who has agreed not to disclose the documents) without first giving the company ten days' notice of its intention to do so. In any event, there is an issue about the

following particular provisions of paragraph 8(a)-(c) pertaining to documents designated confidential by the company:

(a) the unlimited right to designate documents as confidential;

(b) the requirement of inspection only at the Secretary's office;

(c) the prohibition of any copying;

(d) the limitations on access and use by supervisors of attorneys officially assigned to the investigation, by consultants retained by the FTC, by the Commissioners or their staffs, by the General Counsel or his staff, or by the Secretary or his staff, as may be required in the performance of their regular duties;

(e) the limitation on use only in connection with this investigation even if the documents may also be relevant to another matter within the FTC's authority;

(f) the requirement to obtain a court order before any document may be disclosed or used other than as provided in paragraph 8, including disclosure in response to an official request or process issued by a Congressional Committee or Subcommittee or by a court, or in response to a request for access under the Freedom of Information Act with respect to documents that the FTC does not believe are exempt from disclosure under that Act;

(g) the requirement to return all copies of documents at the conclusion of the investigation, even if they may be relevant in connection with other investigations or activities of the FTC.

14. Notwithstanding the FTC's position on the disputed issues as set forth in the preceding paragraphs, the FTC would be agreeable to having the subpoena en-

forced subject to the modifications set forth in the following paragraphs, in addition to those set forth in paragraph B(1) and (2) of the Stipulation. The FTC has offered the following modifications to the Companies, but the Companies have found them unacceptable as a basis for settling the disputes about the subpoena.

15. With respect to Specifications G and I:

(a) To the extent that estimates or evaluations of the volume of natural gas (regardless of how characterized) are contained in bid files, all estimates of proved or probable reserves must be produced, and estimates of possible, speculative, or other reserves must be produced only as to tracts in which the company acquired an ownership interest or with respect to which the company's employee (if any) had reporting responsibility for the Southern Louisiana Subcommittee of the American Gas Association Committee on Natural Gas Reserves.

(b) Other documents in bid files (including those concerning bidding methodology) need not be produced, provided that the Commission shall be entitled to examine them at the company's offices at reasonable times selected by the Commission.

(c) Under Specification I(1), documents that only "relate" but do not refer to, analyze, compare, comment on, and/or set forth estimates covered by Specifications G (1) and G(2) need not be produced.

(d) Under Specification I(1), for estimates covered by Specification G(3), only the following immediate underlying data used to make the estimate need be produced at this time: (1) for estimates arrived at volumetrically the company must supply all the underlying numbers which were used in the formula, including the recovery factor and the size of the reservoir(s); (2) for estimates arrived at by pressure decline curves the company must submit the curve used; (3) for other types of estimates, such as material balance estimates, reservoir simulation estimates, and probable reserve estimates, the Companies must submit similar underlying data.

(e) Specifications I(2) and I(4) may be limited to documents relating to Southern Louisiana.

(f) Under Specification I(2), the company must produce the same types of documents as specified in paragraph 15(d) of this Appendix for natural gas estimates or evaluations made available to the FTC by the American Gas Association and presently at Price, Waterhouse & Co. relating to field-by-field estimates for Offshore Southern Louisiana.

(g) As to documents covered only by Specification I (3), the company need not produce them but must permit the FTC to examine them at the company's offices at reasonable times selected by the FTC, subject to the FTC's right to seek production of such documents pursuant to paragraph 9 of said Order.

(h) Under Specification I(4), the company must produce the specified compilations, studies, or reports, and, as to such compilations, studies, or reports relating to specific acreage in Offshore Southern Louisiana, must produce the same types of underlying documents specified in paragraph 15(d) of this Appendix.

(i) Specification I(5) may be limited to correspondence between the company and the United States Geological Survey relating to whether a well is capable of producing in paying quantities for the purpose of receiving a suspension of production.

16. Under Specifications H(5)(a) and (b), the company need not produce documents concerning any well as to which the company indicates by affidavit that its internal well designation on the well corresponds to that

used by the company in reporting to the U.S. Geological Survey (USGS) on Forms 9-152, 9-330 and 9-331(c).

17. Specifications J and K may be limited to documents relating to Southern Louisiana.

18. In lieu of paragraph 8(a)-(c) of said Order, the following limitations may be substituted:

Subject to the exceptions set forth below, the FTC will not disclose any of the documents produced which a company designates confidential to any person outside the employ of the FTC (other than an outside consultant retained by the FTC who has agreed not to disclose the documents) without first giving the company ten days' notice of its intention to do so.

(a) With respect to an official request for such documents from a committee or subcommittee of Congress or a court (by compulsory process), the FTC will advise the Congressional committee or subcommittee or the court that the company considers the material to be confidential, and will give the company ten days' prior notice where possible, and in any event, as much advance notice as can reasonably be given, before releasing or granting access to the documents.*

(b) The above notice provisions shall not apply to any information which (1) is now in the public domain; (2) enters the public domain from a source other than the FTC or its employees; (3) was in the FTC's possession prior to disclosure to the FTC by the company;

* If the Court were to determine that the possibility of disclosure to Congress is such a serious deficiency in the FTC's authority to pledge confidentiality to warrant adoption of the modification set forth in paragraph 13 of this Appendix, that modification would supplant the modification proposed in this subparagraph. The FTC would be agreeable to the modification set forth in this subparagraph even if the Court does not determine that such a deficiency existed.

or (4) is supplied to the FTC or its employees by a third party lawfully in possession thereof.

(c) In the event that the investigation with respect to which the subpoena issued results in issuance of an adjudicative complaint, the confidential status of the documents and the limitations on their disclosure shall be governed solely by the applicable provisions of the FTC's Rules of Practice, Part 3—Rules of Practice for Adjudicative Proceedings.

19. Paragraph 6 of said Order may be modified to provide that the Company will produce all documents within 90 days.

Respectfully submitted,

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/s/ Gerald P. Norton
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 74-1547, 74-1548, 74-1550,
74-1551, 74-1553, 74-1554

FEDERAL TRADE COMMISSION,
Appellant,

v.

TEXACO INC., et al.,
Appellees.

APPENDIX B: APPELLEES' COUNTERSTATEMENT OF ISSUES

This Appendix sets forth those issues which appellees Exxon Corporation, Shell Oil Company, Mobil Oil Corporation, Texaco Inc. and Standard Oil Company of California believe are before this *en banc* Court for consideration pursuant to the Court's vacation of the panel's opinion (reported at 517 F.2d 137-62) which had affirmed, as modified, the District Court's Order entered on March 22, 1974:

1. Whether the panel reached the correct result under applicable principles of collateral estoppel in approving in modified form the Order of the District Court.

2. Whether, independently of its decision on collateral estoppel, the panel nevertheless reached the correct result in concluding that the District Court did not abuse its discretion in modifying the subpoenas so as to avoid unnecessary burdens and duplication in compliance and in affirming the District Court Order in modified form. In particular, whether the panel properly affirmed the District Court's Order insofar as it reduced the compliance burdens and apportioned the expenses among Appellees and Appellant by modifying the subpoena in the following respects:

a. limiting production to materials pertinent to proved reserves;

b. limiting production to a random sample of forty-five percent of the pertinent fields;

c. limiting applicable time periods and geographic areas to those most pertinent to the investigation;

d. limiting production to exclude bid calculation files; and

e. requiring, in recognition of the search and segregation burden imposed on Appellees, the Federal Trade Commission to bear a portion of the expense of compliance by providing for production at the situs of the documents and imposing copying and transportation costs upon the FTC.

3. Whether, independently of its decisions on collateral estoppel and burden, the panel nevertheless reached the correct result in concluding that the District Court did not abuse its discretion in holding that the bid files are irrelevant.

4. Whether the District Court abused its discretion in providing for confidentiality protection for concededly sensitive, proprietary materials to be produced to the Federal Trade Commission, and whether the panel, independently of its decisions on collateral estoppel, burden and relevancy, correctly affirmed the District Court's Order in this regard.

The statement of issues contained in the Federal Trade Commission's Appendix A essentially calls for this Court, sitting *en banc*, to consider *de novo all* the issues raised by the FTC in the District Court; to redraft an order entered by the District Court on the basis of an eviden-

tiary record and fact findings which enforced in part and quashed in part an administrative subpoena; and, ultimately to reinstate the subpoenas in their entirety without regard to the prior proceedings. We believe the issues stated herein by Appellees are the only issues properly before the Court at this stage and we submit that this Court should affirm the District Court's Order as modified by the panel and by the agreements set forth in the accompanying stipulation.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1549

FEDERAL TRADE COMMISSION,
Appellant,

v.

SUPERIOR OIL COMPANY,
Appellee.

STIPULATION

Pursuant to the Order of the Court dated April 21, 1976, counsel for the FTC and Superior Oil Company ("Superior") have met and conferred for the purpose of seeking agreement as to the issues which divide them on this appeal. The FTC and Superior have been unable to agree on any modifications of the district court's order of March 22, 1974, concerning Superior which would eliminate or narrow the issues remaining for decision by this Court. The parties are filing herewith separate statements of what they regard as the issues, in which they also identify certain modifications that one or the other of them would find acceptable.

Attorney for the FTC

Attorney for Superior Oil Company

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1549

FEDERAL TRADE COMMISSION,
Appellant,

v.

SUPERIOR OIL COMPANY,
Appellee.

FTC'S STATEMENT OF ISSUES AND PROPOSED MODIFICATIONS

This Statement of Issues sets forth issues relating to the district court's order of March 22, 1974 ("said Order"), which the FTC believes still require decision by the Court (see paragraphs 1-3). It also sets forth modifications the FTC is willing to accept but which Superior Oil Company ("Superior") has not agreed to (paragraphs 5-10)

1. There is an issue about the district court's ruling in the third paragraph in that the FTC believes that Specifications G-J should not have been denied enforcement and quashed in their entirety. The FTC believes, with the exception of the court's exclusion of raw field data and maps and other documents relating to the suspected location of natural gas in currently unleased acreage, that this ruling is erroneous.

2. There is an issue about the district court's ruling in the first sentence of the second paragraph in that the FTC believes that 180 days to comply, rather than the 30 or more days allowed in the subpoena, is an unduly long period.

3. There is an issue about the confidentiality limitations of the fourth paragraph (a)-(c). The FTC be-

lieves that no such limitations should have been imposed. As stated in its Supplemental Reply Brief and during oral argument, the FTC agrees that, if the Court believes that there is a sufficient problem as to confidentiality to warrant protection beyond that normally available, subparagraphs (a)-(c) of the fourth paragraph may be replaced by a provision requiring that, with respect to documents produced under the order and designated confidential by Superior, the FTC will not disclose such documents to any person outside the employ of the FTC (other than an outside consultant retained by the FTC who has agreed not to disclose the documents) without first giving Superior ten days' notice of its intention to do so. In any event, there is an issue about the following particular provisions of the fourth paragraph pertaining to documents designated confidential by Superior:

(a) the unlimited right to designate documents as confidential;

(b) the requirement of inspection only at the Secretary's office;

(c) the prohibition of any copying;

(d) the limitations on access and use by supervisors of attorneys officially assigned to the investigation, by consultants retained by the FTC, by the Commissioners or their staffs, by the General Counsel or his staff, or by the Secretary or his staff, as may be required in the performance of their regular duties;

(e) the limitation on use only in connection with this investigation even if the documents may also be relevant to another matter within the FTC's authority;

(f) the requirement to obtain a court order before any document may be disclosed or used other than as provided in the fourth paragraph, including disclosure in response to an official request or process issued by a

Congressional committee or subcommittee or by a court, or in response to a request for access under the Freedom of Information Act with respect to documents that the FTC does not believe are exempt from disclosure under that Act;

(g) the requirement to return all copies of documents at the conclusion of the investigation, even if they may be relevant in connection with other investigations or activities of the FTC.

4. Notwithstanding the FTC's position on the disputed issues as set forth in the preceding paragraphs, the FTC would be agreeable to having the subpoena enforced subject to the modifications set forth in the following paragraphs. The FTC has offered these modifications to Superior, but Superior has found them unacceptable as a basis for settling the dispute about the subpoena.

5. Specification G may be modified to require Superior to produce only documents containing proved natural gas reserve estimates.

6. Specification H may be modified to require Superior to produce only documents responsive to Specifications H(1) and H(5). Under Specification H(5)(a) and (b), Superior need not produce documents concerning any well as to which Superior indicates by affidavit that its internal well designation on the well corresponds to that used by Superior in reporting to the U.S. Geological Survey (USGS) on Forms 9-152, 9-330, and 9-331(c).

7. Specification I(1) may be modified to limit production to the following documents:

(a) Under Specification I(1), for estimates covered by Specifications G(1) and G(2), only documents that refer to, analyze, compare, comment on, and/or set forth such estimates need be produced.

(b) Under Specification I (1), for estimates covered by Specification G(3), only the following immediate underlying data used to make the estimate need be produced at this time: (1) for estimates arrived at volumetrically the company must supply all underlying numbers which were used in the formula, including the recovery factor and the size of the reservoir(s); (2) for estimates arrived at by pressure decline curves Superior must submit the curve used; (3) for other types of estimates, such as material balance and reservoir simulation estimates Superior must submit similar immediate underlying data.

(c) Under Specification I(1) Superior shall also produce documents which refer, analyze, compare, comment on, and/or set forth for all categories of natural gas reserve estimates and evaluations used by Superior, the procedures, criteria or interpretations used in preparing such estimates and the identity of organizational units and personnel of Superior involved in such preparation and completion.

(d) Under Specification I(2) only documents relating to South Louisiana need be produced.

(e) Under Specification I(5) only correspondence between Superior and the United States Geological Survey relating to whether a well is capable of producing in paying quantities for the purpose of receiving a suspension of production need be produced.

8. Specifications J and K may be modified to limit production to documents relating to South Louisiana.

9. In lieu of the fourth paragraph (a)-(c) of said Order, the following limitations may be substituted:

Subject to the exceptions set forth below, the FTC will not disclose any of the documents produced which Superior designates confidential to any person outside the employ of the FTC (other than an outside consultant

retained by the FTC who has agreed not to disclose the documents) without first giving Superior ten days' notice of its intention to do so.

(a) With respect to an official request for such documents from a committee or subcommittee of Congress or a court (by compulsory process), the FTC will advise the Congressional committee or subcommittee or the court that Superior considers the material to be confidential, and will give Superior ten days' prior notice where possible, and in any event, as much advance notice as can reasonably be given, before releasing or granting access to the documents.*

(b) The above notice provisions shall not apply to any information which (1) is now in the public domain; (2) enters the public domain from a source other than the FTC or its employees; (3) was in the FTC's possession prior to disclosure to the FTC by Superior; or (4) is supplied to the FTC or its employees by a third party lawfully in possession thereof.

(c) In the event that the investigation with respect to which the subpoena issued results in issuance of an adjudicative complaint, the confidential status of the documents and the limitations on their disclosure shall be governed solely by the applicable provisions of the FTC's Rules of Practice, Part 3—Rules of Practice for Adjudicative Proceedings.

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* If the Court were to determine that the possibility of disclosure to Congress is such a serious deficiency in the FTC's authority to pledge confidentiality to warrant adoption of the modification set forth in paragraph 3 of this Statement, that modification would supplant the modifications proposed in this subparagraph. The FTC would be agreeable to the modification set forth in this subparagraph even if the Court does not determine that such a deficiency existed.

10. The first sentence of the second paragraph of said Order may be modified to provide that Superior shall comply within 90 days.

Respectfully submitted,

/s/ Robert J. Lewis
ROBERT J. LEWIS
General Counsel

/s/ Gerald P. Norton
GERALD P. NORTON
Deputy General Counsel

/s/ Gerald Harwood
GERALD HARWOOD
Assistant General Counsel

Federal Trade Commission
Washington, D.C. 20850

May 19, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Received May 10, 1976, Division of Litigation]

No. 74-1549

FEDERAL TRADE COMMISSION,
Appellant,

v.

THE SUPERIOR OIL COMPANY,
Appellee.

STATEMENT OF THE SUPERIOR OIL COMPANY

Counsel for the FTC and Superior have met on May 5 and May 12, 1976, pursuant to this Court's direction at oral argument on April 19, 1976, to discuss the issues between them on this appeal. Counsel for the FTC and Superior have been unable to reach an agreement which would result in the disposition of this appeal without the necessity for decision of the issues by this Court.

Superior is willing to agree to certain modifications of the confidentiality provisions of the separate order which the District Court entered as to it. (A copy of the order as to Superior is attached hereto). These modifications are as follows:

1. The following proviso shall be added to subparagraph (a) of the confidentiality provisions of the Order:

> "*Provided that,* nothing in this order shall prohibit disclosure of materials produced by respondent to commissioners of the FTC in connection with the performance of said commissioners' official functions; nothing in this order shall prohibit employees of the Trade Commission from referring to or relying on

any of the materials produced by respondent in connection with the presenting of any recommendation to the Trade Commission for or against issuance of a complaint; and nothing in this order shall prohibit the Trade Commission from referring to or relying on any of the materials produced by respondent in connection with any determination for or against issuance of any complaint based on such materials."

2. The following qualifying language shall be added to subparagraph (b) of the confidentiality provisions of the Order:

"In the event the Trade Commission desires to release any confidential material, it shall so notify the Court and respondent, specifying the material it desires to release, and respondent may, within ten days of receipt of such notice, file with the Court opposition to such release. The respondent shall bear the burden of proving the material is entitled to continued confidential treatment upon notice that the Trade Commission intends to release any such material. No such data may, however, be released until this Court shall enter its order permitting such release."

3. The following proviso shall be added to subparagraph (c) of the confidentiality provisions of the Order:

"*Provided that*, in the event the Trade Commission issues a formal complaint, at the conclusion of the investigation, the confidential material produced by respondent may be offered and received in evidence in the complaint proceeding provided that respondent shall be given opportunity to request appropriate confidential treatment of such material.

Despite these concessions by Superior, the FTC was unwilling to accept the other provisions of the District

Court's order as to Superior and to dismiss its appeal from the District Court's order as to Superior. The FTC refuses to accept the District Court's decision denying enforcement of and quashing four of the Specifications (G through J) as to Superior on grounds of relevancy. Instead the FTC insists on enforcement of these four specifications subject to only minor limitations and exclusions, despite their demonstrated irrelevancy as to Superior. The FTC's position is unacceptable to Superior.

Accordingly, in view of the inability of the parties to reach agreement, the issues tendered by the FTC's appeal remain before this Court for decision. In Superior's view, as set forth in our Brief (p. 2), the following issues are still presented:

"1. Whether, as to Superior, the District Court abused its discretion in the circumstances shown by the record in the present case by granting in part and denying in part enforcement of the FTC's subpoena duces tecum.

2. Whether the District Court abused its discretion in providing that confidential information produced by Superior pursuant to the subpoena

shall not be disclosed without further order of the Court."

Respectfully submitted,

ARNOLD & PORTER

/s/ Daniel A. Rezneck
ABE KRASH
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Dated: May 19, 1976

APPENDIX A

ORDER

Upon consideration of the Federal Trade Commission's petition for enforcement of a subpoena *duces tecum*, the matter having been fully briefed and argued before the Court, and the Court being advised in the premises, it is this 22nd day of March, 1974,

ORDERED, That the respondent, The Superior Oil Co., Inc., shall comply, within 180 days from the date on which this Order becomes final, with Specifications A through F and K through L of the subpoena, provided that Specifications A, B, D, E and F may be complied with by submitting a verified written statement by an officer of the Company containing the requested information in lieu of the documents specified, and it is

FURTHER ORDERED, That as to the respondent, The Superior Oil Co., Inc., Specifications G through J of the subpoena be, and the same hereby are, denied enforcement and quashed; and it is

FURTHER ORDERED, That any document produced under this Order which contains confidential information may be designated as being confidential by the respondent, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of

any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

SO ORDERED THIS 22 DAY OF MARCH, 1974.

GEORGE L. HART JR.
George L. Hart Jr.
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

[Filed April 21, 1976]

No. 74-1547 *et al.*

FEDERAL TRADE COMMISSION,
Appellant

v.

TEXACO, INC.

(Civil 1089-73)
and consolidated cases

Before: BAZELON, Chief Judge, and WRIGHT, LEVENTHAL, ROBINSON, MACKINNON, and WILKEY, Circuit Judges.

ORDER

It appearing that the parties, in open court, have agreed to confer for the purpose of seeking an agreement as to the issues which divide them on this appeal,

It is ORDERED by the court that the parties file a stipulation with the Clerk of this court, on or before May 19, 1976, stating precisely (1) the issues on which they have agreed, and (2) the issues which remain to be resolved by the court.

Per Curiam

For the Court

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

March 16, 1976

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In Re: No. 74-1547, et al.—
Federal Trade Commission v. *Texaco, Inc.*

Gentlemen:

Prior to oral argument en banc the court wishes to have supplemental memoranda on the issues raised by this litigation. Each of the following questions has been put forward by one or more of the judges on the en banc court as an issue that should be discussed in the supplemental memoranda. Where citations appear, the judge proposing the question is indicating a desire to have the memoranda discuss the case cited and its implications. Counsel are not restricted to these issues.

1. Does the doctrine of collateral estoppel apply to this case?

(a). Of what significance is the fact that the Federal Power Commission determination was in a rate proceeding? Is this a "quasi-judicial" determination? In order for collateral estoppel to be operative, is it necessary for the agency to have been acting in a "judicial capacity", *cf. United States* v. *Utah Construction Co.*, 384 U.S. 394, 421 (1966).

(b). To what extent, if any, does the doctrine of collateral estoppel apply to appraisals by the Federal Power Commission concerning the scope of the antitrust laws that are not intended as determinations of the reach of these laws but as determinations of the more encompassing "public interest" in the laws administered by the FPC? *Cf. United States* v. *RCA*, 358 U.S. 334 (1959).

(c). To what extent, if any, is the issue of collateral estoppel an issue "on the merits" that is open for decision on an administrative agency's action to enforce a subpoena? *Cf. Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943).

(d). Was the factual issue that arose before the FPC defined by its finding that the AGA reserve data are reasonably reliable for the purpose of costing new gas in the area, see 46 FPC at 116? To what extent is the issue that F.T.C. intends to cover in its inquiry the same or different?

2. The district court rejected the FTC's application for the Bid Files on the ground that they are not relevant to any calculation of "proved" reserves.

(a). Does FTC agree that the Bid Files are not relevant to calculation of "proved" reserves?

(b). If so, on what basis does FTC support its application for those files?

(c). Is the FTC suggesting that investigation may show that there is an unreasonable restraint, or unfair method of competition, in limiting disclosure of estimates that are taken into account in decisions by companies even though they are not yet "proved" reserves?

3. Does the FTC have in mind as a purpose of its investigation that it may wish to prepare a report to Congress on the status of unproved reserves? If so, would that be a valid function of the FTC?

* * * *

The Memoranda should be filed in accordance with the following schedule:

1) Memorandum of appellant—within 14 days from date of this letter, and in any event by no later than March 30.

2) Memorandum of appellees—within 9 days from date of service of appellant's memorandum and in any event by no later than April 8.

3) Reply Memorandum of appellant —within 5 days from dates of service of appellees' memoranda, and in any event by no later than April 13.

Yours very truly,

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

[Filed February 6, 1976]

No. 74-1547 et al.

FEDERAL TRADE COMMISSION,
Appellant

v.

TEXACO, INC.

(Civil 1089-73)
And Consolidated Cases

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

On consideration of appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED by the Court *en banc* that appellant's aforesaid suggestion for rehearing *en banc* is granted, and it is

FURTHER ORDERED by the Court *en banc*, *sua sponte*, that the opinion and judgment filed herein on August 8, 1975 are hereby vacated.

Per Curiam

For the Court:

ROBERT A. BONNER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
Chief Deputy Clerk

Circuit Judges McGowan, Tamm and Robb did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 74-1547 to 74-1551 and
74-1553, 74-1554

FEDERAL TRADE COMMISSION,
Appellant,
v.
TEXACO, INC., et al.,
Appellees

Argued 18 April 1975

Decided 8 Aug. 1975

Before MacKINNON and WILKEY, *Circuit Judges* and JAMESON,* *Senior United States District Judge* for the District of Montana.

WILKEY, *Circuit Judge*:

This litigation is an outgrowth of a Federal Trade Commission (FTC) investigation into the reporting of natural gas reserves by natural gas producers in Southern Louisiana.[1] Specifically, we have before us seven consolidated appeals by the FTC from orders entered by the District Court granting enforcement in part and

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Southern Louisiana as used throughout this opinion includes the offshore producing area (seaward from the Louisiana coastline) and that portion of Louisiana defined as the "South Louisiana District." Joint Brief for Appellees Texaco, Inc., Standard Oil Co. (Indiana), Shell Oil Co., and Exxon Corp. [hereinafter Common Counsel Brief], p. 3 n.4. Southern Louisiana is recognized as the most important gas-producing area in the country. *Southern Louisiana Area Rate Cases*, 428 F.2d 407, 418 (5th Cir.), *cert. denied*, 400 U.S. 950, 91 S.Ct. 243, 27 L.Ed.2d 257 (1970).

denying enforcement in part of subpoenas *duces tecum* issued by the Commission to appellees, seven large natural gas producers, in connection with its investigation. The subpoena issued to each of the appellees and the orders issued by the District Court are reproduced as appendices to this opinion.

I. *The Facts and the Issues*

The American Gas Association (AGA) is a trade association of producers, distributors, and marketers of natural gas. Through its Committee on Natural Gas Reserves, the AGA has since 1946 been providing the industry, the Government, and the general public with annual estimates of the *proved* natural gas and natural gas liquid reserves of the United States.[2] For the purposes

[2] Throughout this opinion we will use the term "proved reserves." The following is the definition of proved reserves adopted by the AGA in its annual publication, "Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity," Volume 28, June 1974. The first two paragraphs of the following definition appear on page 103 of this publication, the third paragraph is derived from page 99 and the last paragraph is derived from pages 96 and 97:

> Proved Reserves are the estimated quantity of natural gas which analysis of geologic and engineering data demonstrate with reasonable certainty to be recoverable in the future from known oil and gas reservoirs under existing economic and operating conditions. Reservoirs are considered proved that have demonstrated the ability to produce by *either actual production or conclusive formation test.*
>
> The area of a reservoir considered proved is *that portion delineated by drilling* and defined by gas-oil, gas-water contacts or limited by the structural deformation or lenticularity of the reservoir. In the absence of fluid contacts, the lowest known structural occurrency of hydrocarbons controls the proved limits of the reservoir. The proved area of a reservoir may also include the *adjoining portions* not delineated by drilling but which can be evaluated as economically productive on the basis of geological and engineering data available at the time the estimate is made. Therefore, the reserves reported should include total proved reserves which may be in either the drilled or the undrilled portions of the field or reservoir.
>
> Natural gas reserves take into account the shrinkage of the reservoir gas volume resulting from the removal of the liquefiable portions of the hydrocarbon gases and the reduction of volume due to the exclusion of non-hydrocarbon gases where they occur in sufficient quantity to render the gas unmarketable.
>
> The proved reserves estimated are to include all gas reserves regardless of size, availability of market, ultimate disposition or use.

of gathering reserve data, the nation is divided into ten geographical districts. A member of the Committee on Natural Gas Reserves is assigned to each district; the committee member in turn appoints a subcommittee to assist him in gathering reserve data within the district. The FTC's investigation focuses on the activities of the South Louisiana subcommittee.

In May 1969 when the AGA reported its 1968 figures, they indicated a decline in proved reserves nationally, the first such decline ever reported. Before the year was out, this and other information reaching the Federal *Power* Commission prompted a reopening of its just-concluded Southern Louisiana Area Rate Proceeding. Those proceedings will be discussed in more detail below. The May 1970 report for 1969 showed even further declines for total United States reserves and total Southern Louisiana reserves.

In late 1970 the Federal *Trade* Commission began an investigation into the reporting of proved natural gas reserves in Southern Louisiana. In June 1971 the investigation took on more formal status when the Trade

Commission issued a resolution authorizing the use of compulsory process in furtherance of a nonpublic investigation. In that resolution the nature and scope of the investigation was defined as follows:

> The purpose of the authorized investigation is to develop facts relating to the acts and practices of . . . [certain named corporations] to determine whether said corporations, and other persons and corporations, individually or in concert are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum, and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act.[3]

From the beginning of its investigation the AGA had been cooperating with the Trade Commission on a voluntary basis. As a result the Commission was able to obtain the field-by-field estimates of proved reserves made by each Southern Louisiana subcommittee member for the years 1966 through 1970.[4] The Commission had also

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[3] Appendix [hereinafter App.] III 497a.

[4] These statistics were made available to the FTC subject to an agreement restricting access to and disclosure of the data. The agreement provided, *inter alia*, that:

> (2) Representatives of your Bureau [i.e., the Commission's Bureau of Competition] will make use of such reports only in connection with its current investigation into the reporting of natural gas reserves by the American Gas Association, and for the purpose of verification of natural gas reserves estimates reported by the A.G.A. Committee on Natural Gas Reserves; and shall not release, disclose, disseminate or publicize in any manner, to any person, any statistic or data contained in such reports, unless otherwise available in published records or documents, without twenty days prior notice, and opportunity to seek appropriate legal protection or relief, to A.G.A. and to each member of the South Louisiana Subcommittee whose statistics are to be disclosed by the Commission.

Supplemental Reply Brief, pp. 3-4. The agreement also provided that custody of the documents be maintained by a neutral third party, Price Waterhouse & Co.

The producers have alleged in supplemental filings before this court that the FTC breached this agreement by releasing to a Congressman certain staff and working papers containing excerpts from the AGA reserve statistics after less than 72 hours' notice. In a reply the Commission conceded that it had released the information to the Congressman, who by a phone call "required that the documents be immediately released" to him. The Commission argues, however, that the above paragraph was intended to prohibit disclosure of the data to the public or to competitors, and was not meant to cover the case where a Member of Congress or Congressional committee might immediately require use of the data. In addition, the Trade Commission argues that it lacks the statutory power to keep the data confidential to begin with.

[5] App. III 498a-525a.

obtained reserve information from Form 15 reports filed with the Federal Power Commission. These reports are filed by interstate natural gas pipelines and list recoverable, saleable gas reserves committed to, collected by, or held by reporting pipelines.

Approximately one year after beginning its investigation, on 24 November 1971, the Commission's staff issued identical administrative subpoenas *duces tecum* to eleven natural gas producers. All eleven producers moved to quash the subpoenas. The motions to quash or limit were denied by the Commission on 27 June 1972.[5] Following the Commission's denial, the Trade Commission's staff, after negotiations with the gas producers, offered additional safeguards for the confidentiality of information

to be supplied. As a result two producers agreed to comply fully with the subpoenas and one agreed to comply in part. (Soon after petitions for enforcement were filed in the District Court, one more firm agreed to comply with the subpoena.)

Petitions for enforcement of the remaining subpoenas were filed in the District Court on 4 June 1973. On 30 July 1973 the District Court held a hearing on preliminary motions and also heard a preliminary presentation of the issues posed by the case. Subsequently evidentiary materials and briefs were filed by all parties. A second hearing was held on 13 December 1973 at which time the issues were fully argued to the court over a period of several hours.

The two orders here under review were filed on 22 March 1974. One order covered the subpoenas issued to appellees Texaco, Inc., Standard Oil Co. (Indiana), Shell Oil Co., Exxon Corp., Standard Oil Co. of California, and Mobil Oil Corp. The other order related to the subpoena issued to the Superior Oil Co., Inc. (hereinafter Superior). The former order enforced specifications A, B, C, D, E, and F in full; however, it only granted partial enforcement of the remaining specifications, G through L.

The District Court found the subpoenas to be overly broad and unduly burdensome because they sought to duplicate activities of the Federal Power Commission which had already resulted in a finding that AGA proved reserve estimates were valid and accurate. As a result, specifications G through L were modified so that raw field data, bid calculation data, and bid calculation files need not be produced. However, all documents containing or underlying *proved* reserve estimates in the offshore Southern Louisiana area are to be produced.

The court, in an attempt to make the subpoenas less burdensome, limited production of these documents to a

random sample of 100 out of approximately 225 relevant fields and to the years 1969, 1970, and 1971. Specifications J, K, and L were similarly modified so that only documents relating to proved natural gas reserve estimates in the offshore Southern Louisiana area need be submitted. However, the court enforced the subpoena as regards any documents prepared between 1966 and 1971, inclusive, "which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondents or others, including the American Gas Association." The subpoenas were also modified so that additional protections were afforded to confidential information. In addition, producers were accorded the option of producing records for inspection where they were stored.

Superior was in a different position from the other six producers. Superior had never been a member of the AGA nor had it ever furnished proved reserve figures to the AGA. Superior's employees also had not participated in the work of AGA's committees or subcommittees. As a result, the District Court enforced specifications A through F and K through L in full and denied enforcement of specifications G, H, I, and J. Identical confidentiality protections were afforded Superior.

Because the producers have not cross-appealed, the issues before us relate solely to the limiting modifications made by the District Court. For the purposes of this opinion, we have formulated those issues as follows:

(1) Was the District Court in error in refusing to enforce those portions of the subpoenas that called for documents which did not relate to estimates of proved reserves?

(2) Did the District Court abuse its discretion in limiting production of documents to a random sample of fields and to the years 1969, 1970, and 1971?

(3) Did the District Court abuse its discretion in attaching conditions to disclosure to insure confidentiality and in permitting documents to be produced for inspection at their situs?

(4) Was the District Court in error in affording Superior Oil differing treatment?

We proceed now to deal with these issues.[6]

II. *Documents Which Did Not Relate to Proved Reserves*

A. *The Arguments*

The producers have never quarreled with the power or the right of the Federal *Trade* Commission to investigate the natural gas industry to uncover violations of

[6] Standard Oil Co. of California argues that the six producers order is not a final decision within the meaning of 28 U.S.C. § 1291 and therefore is not appealable. We disagree. It is well established that an order of a District Court granting or denying a petition of an agency for enforcement of an administrative subpoena is a final decision and hence appealable. *Ellis* v. *ICC*, 237 U.S. 434, 442, 35 S.Ct. 645, 59 L.Ed. 1036 (1915); *Int'l Brotherhood of Electrical Workers* v. *EEOC*, 398 F.2d 248, 251 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1021, 89 S.Ct. 628, 21 L.Ed. 565 (1969); *Martin* v. *Chandis Securities Co.*, 128 F.2d 731, 734 (9th Cir. 1942). The mere fact the District Court indicated that it might be persuaded to reconsider certain aspects of the order if the Commission were able to make an adequate showing *after* examining the documents to be produced does not deny the order of its final character. A final decision is not necessarily "the last order possible to be made in a case. . . ." *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964). A "practical rather than a technical construction" of the District Court's order, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949), indicates that the Trade Commission should be entitled to appeal an order which shows every sign of being a final resolution of its controversy with the six producers.

the antitrust laws or unfair trade practices. However, they argue that there can be no possible reason for wanting documents that do not relate to proved reserve estimates because it is only *proved* reserve estimates that are taken into account by the Federal *Power* Commission in the setting of area rate ceilings. In addition, they argue that the Federal Power Commission, the only agency possessing the requisite expertise, has determined that AGA proved reserve data is accurate. Therefore, the FTC is collaterally estopped from relitigating the issue.

The Trade Commission, on the other hand, points out that there is no provision in the Federal Trade Commission Act (FTCA) excepting gas producers from the coverage of the Act, as there is for banks and certain common carriers, and that therefore jurisdiction to investigate exists. They argue that such jurisdiction is broad, "reaching not only existing violations of . . . [the Sherman and Clayton Acts], but trade practices which conflict with their basic policies."[7] The Trade Commission goes on to argue that, as a factual matter, its investigation does not duplicate studies made by the Federal Power Commission and that, even if it did, collateral estoppel would be inapplicable because its purpose in determining the accuracy of reserve data is different from the Power Commission's purpose in determining accuracy.[8]

[7] Appellant's Brief, pp. 17-18.

[8] We are fully cognizant of section 15(b) of the Federal Energy Administration Act of 1974, P.L. 93-275, 88 Stat. 96, 109 (7 May 1974), which provides:

> (b) Not later than one year after the effective date of this act, the Administrator shall submit a report to the President and Congress which will provide a complete and independent analysis of actual oil and gas reserves and resources in the United States and its Outer Con-

Although the producers may be correct in arguing that data relating to any reserves other than *proved* reserves would be irrelevant, our reading of the transcript of the 10 December 1973 hearing indicates to us that the District Court had not reached the issue of relevance in regard to the totality of all documents subpoenaed. The court believed that the Trade Commission had subpoenaed *all* reserve records in order to determine independently

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tinental Shelf, as well as of the existing productive capacity and the extent to which such capacity could be increased for crude oil and each major petroleum product each year for the next ten years through full utilization of available technology and capacity. The report shall also contain the Administration's recommendations for improving the utilization and effectiveness of Federal energy data and its manner of collection. The data collection and analysis portion of this report shall be prepared by the Federal Trade Commission for the Administration. Unless specifically prohibited by law, all Federal agencies shall make available estimates, statistics, data and other information in their files which, in the judgment of the Commission or Administration, are necessary for the purposes of this subsection.

The FTC has never argued that this statute provides independent justification for their subpoenas, since, of course, the subpoenas were issued three years before the statute was enacted. The Commission has, however, used the statute in its briefs as evidence of the fact that "Congress . . . considers the Federal Trade Commission to have a major role in determining the extent of natural gas reserves." Appellant's Brief, p. 22.

In furtherance of its duties under section 15(b), the Trade Commission has prepared yet another questionnaire concerning proved reserves and has sent it to "60 selected natural gas producers." Letter of 28 April 1975 from Commission to the court. The Commission's staff intends to use the responses along with information gathered by the Federal Power Commission and other government agencies in preparing its natural gas study and in aiding the Federal Energy Administrator in the preparation of its energy report. *Ibid.*

the total gas reserves of the area. Since the Power Commission had already determined that AGA figures were accurate, the court was of the view that the Trade Commission could not force the producers to relitigate the matter and that, in any event, it would be unduly *burdensome* to permit yet another plenary investigation (for the third time in two years) of natural gas reserves.

In order to fully understand the District Court's ruling on this aspect of the case, it is necessary for us to discuss the previously alluded to Power Commission investigations.

B. *The Federal Power Commission Investigations*

Although the Federal Power Commission (FPC) began area rate proceedings in 1961 for the Southern Louisiana area, it was not until 1968 that the Commission rendered a final decision, which in turn was modified in early 1969. Even before oral argument could be heard before the Fifth Circuit on petitions for review sought by producers, pipeline companies, and consumers, the FPC had instituted new proceedings (*So La II*) "to reconsider all major actions it had taken" in the prior proceeding.[9] As the FPC stated in its order instituting *So La II*, Phase I of its new proceeding "should include evidence with respect to the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence . . . ." [10]

The FPC was concerned in *So La II* with complaints that adequate supplies of natural gas were not being produced and would not be produced under the recently

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[9] *Southern Louisiana Area Rate Cases, supra,* at 421.

[10] Order Enlarging Investigation and Proposed Rulemaking Area Rate Proceeding (Southern Louisiana Area), 42 F.P.C. 1110, 1112 (15 December 1969).

ordered area rate ceilings. More important for present purposes, the FPC during *So La II* was presented with the argument by Municipal Distributors Group (MDG), an intervenor which represented the interests of municipal and other publicly owned gas distribution systems, that the supply shortage was more apparent than real. It was argued that "the sharp decline in the supply picture in 1968-69 is revealed by the above record evidence to be caused . . . largely by revisions in the estimates" of proved reserves reported by the American Gas Association (AGA).[11] Such a contention went to the heart of the Power Commission investigation. If it were true that the decline in reserves was a matter of definition and not of economics, the concern of the FPC that new area rates might be required to encourage production would be obviated.

In its final opinion in *So La II* the FPC discussed testimony which was used by MDG to impeach AGA data. The testimony outlined several methods by which producers could withhold reserves from the AGA. Discussed also were MDG's arguments relating to discrepancies between figures gathered by the FPC and those submitted by the AGA. The FPC also referred in some detail to the testimony and exhibits supporting the reliability of AGA data. As a result, it reached the following conclusions:

> AGA and Form 15 data show similar trends of reserves and reserve-to-production (R/P) ratios. AGA data indicates a steady decline in the national R/P ratio from 19 in 1963 to 13 in 1969. Form 15 data indicates a similar decline in the national R/P ratio from 20 in 1963 to 14 in 1969. The American

[11] MDG's Initial Brief in *So La II*, p. 15.

> Gas Association reserve data is not impeached, in our opinion, in this discrepancy.[12]
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> * * * * *
>
> For the reasons stated herein, we find the AGA reserve data is reasonably reliable for the purposes used herein. Accordingly, and because petitioner has not raised any new evidence, we deny the petition to reopen.[13]

In other words, while AGA data started with 19 years of reserves and the Form 15 data started with 20 in 1963, by 1969 each calculation had dropped 6 years off its proved reserve figure, so the two calculations were comparable. Thus, AGA data was shown to be reliable.

The issue was raised again on review before the Fifth Circuit and received the following extensive rebuttal in a footnote:

> [13] As might be expected, there is some controversy over this. Standing virtually alone against the National (and record) judgment of a near energy calamity, the American Public Gas Association (APGA) contends that the current critical shortage of natural gas is but a pretextual "cry of wolf" calculated to mislead FPC into establishing artificially high rates in the producers' behalf. APGA would have us believe that the energy crisis is a mirage—indeed, a hoax! APGA claims that "there appear to be adequate supplies of gas in the domestic United States to satisfy the projected demands of U. S. consumers well into the 21st Century." APGA Supp. Brf. at 5 n. 9. But to talk of "Supplies" of

[12] Order and Opinion Determining Just and Reasonable Rates for Natural Gas Produced in the Southern Louisiana Area, 46 F.P.C. 86, 113 (16 July 1971) (footnotes omitted).

[13] *Id.* at 115.

gas is a misleading oversimplification. Obviously, the gas is not presently available. At most, if there is appropriate exploration, the demonstrable reserves may be exploited to meet the needs. Given a system which depends on private stewardship and marshalling of natural resources, there is a supply shortage if the producers do not produce. FPC has the statutory duty, not only to guard the consumers against super-profits reaped from artificially inflated rates, but also to protect consumer interests by making sure that the rate schedule is high enough to elicit an adequate supply. It is a delicate balancing test. FPC must fix its course to attain the utopian "optimum" rate schedule. Given the current shortage of available supply FPC must swing the pendulum towards the incentive, supply-eliciting side of rates. And so it has done.[14]

In addition to the examination undertaken in relation to the *So La II* proceedings, the Power Commission undertook in early 1971, at the direction of Congress, a National Gas Survey, a portion of which was a National Gas Reserves Survey (NGRS). NGRS was a completely independent survey of reserves and did not rely on AGA figures at any point. However, in the Final Staff Report of the NGRS (May 1973) a comparison was made with AGA figures:

> The NGRS estimate is lower than the estimate by A.G.A.; however, the difference is less than 10 percent. The difference of 23.5 Tcf between the estimate of the non-associated and associated gas reserves for the 6,358 entries in the reported fields category (a) is the primary difference between the

[14] *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 894 n. 13 (5th Cir. 1973), *aff'd sub nom., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974).

> total estimates. The gas reserves in the "A.G.A. omitted fields" are a relatively insignificant part in the total NGRS estimate, and it seems evident that the 62 entries in the "omitted" category (b) are small fields. The two dissolved gas estimates differ by 1.7 Tcf or by about 5 percent.[15]

C. *Collateral Estoppel*

The Supreme Court and this court have clearly stated that an agency or a private party *can* be collaterally estopped in a later court proceeding if a relevant issue had already been resolved in a contested hearing before the agency.[16] The Supreme Court recently affirmed this principle:

> Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had

[15] App. VI 1048a.

[16] *United States* v. *Utah Construction Co.*, 384 U.S. 394, 421-422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940); *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 131 U.S.App.D.C. 226, 231, 404 F.2d 804, 809 (1968); *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed.2d 784 (1969) ("Principles of collateral estoppel may properly be applied in administrative cases."); *Fairmont Aluminum Co.* v. *Commissioner of Internal Revenue*, 222 F.2d 622, 627 (4th Cir.), *cert. denied*, 350 U.S. 838, 76 S.Ct. 76, 100 L.Ed. 748 (1955); *Tampa Phosphate Railroad Co.* v. *Seaboard Coast Line RR Co.*, 418 F.2d 387, 399 (5th Cir. 1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 907, 25 L.Ed.2d 90 (1970); *Int'l Wire* v. *Local 38, Int'l Brhd. of Elec. Workers*, 357 F.Supp. 1018 (N.D. Ohio 1972), *aff'd*, 475 F.2d 1078 (6th Cir. 1973), *cert. denied*, 414 U.S. 867, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973).

an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 [60 S.Ct. 907, 84 L.Ed. 1263]; *Hanover Bank* v. *United States*, 285 F.2d 455, 152 Ct.Cl. 391; *Fairmont Aluminum Co.* v. *Commissioner of Internal Revenue*, [4 Cir.], 222 F.2d 622; *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.*, [3 Cir.], 207 F.2d 255. *See also Goldstein* v. *Doft*, [D.C.N.Y.], 236 F.Supp. 730, *aff'd* [2 Cir.], 353 F.2d 484, *cert. denied*, 383 U.S. 960 [86 S.Ct. 1226, 16 L.Ed.2d 302], where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator.[17]

The Supreme Court has also held that collateral estoppel can be applied when the prior proceeding involved a *different* government agency because for collateral estoppel purposes, agencies of the same government are in privity with each other.

> Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, Rock Island & Pacific Railway Co.* v. *Schendel*, 270 U.S. 611, 620 [46 S.Ct. 420, 423, 424, 70 L.Ed. 757, 53 A.L.R. 1965], "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same." A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell* v. *County of Sac*, 94 U.S. 351 [24 L.Ed. 195]. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.[18]

[17] *United States* v. *Utah Construction Co., supra*, at 421-22, 86 S.Ct. at 1560.

Other Circuits have applied both these principles in appropriate cases. The Eighth Circuit has held that the FTC was collaterally estopped from claiming use of unfair methods of competition where the claim was based on factual issues resolved favorably for defendants in a prior proceeding instituted under the Food and Drug Act.[19] Reciprocally, the Seventh Circuit upheld the defense of collateral estoppel in a proceeding under the Food and Drug Act where a prior proceeding *before* the FTC held that defendant's labeling claims were not deceptive.[20]

It is difficult for us to discern why the policies which support the application of *res judicata* or collateral estoppel between court adjudications involving different agencies would not always be equally applicable between administrative adjudications (especially in an era when administrative agencies are taking on duties which were once the preserve of the courts). However, there is no need to resolve this broader issue at this time because we hold that the application of collateral estoppel is clearly appropriate on the facts of this case. The Trade Commission knew of the Power Commission's adjudicatory proceeding in *So La II* when it initiated its own investigation and could have intervened in the proceeding. We also weigh heavily the fact that the Power Commission has particular expertise on the factual issue involved,

[18] *Sunshine Anthracite Coal Co.* v. *Adkins, supra*, 310 U.S. at 402-03, 60 S.Ct. at 916. *See also French* v. *Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953) (*en banc*).

[19] *George H. Lee Co.* v. *FTC*, 113 F.2d 583 (8th Cir. 1940).

[20] *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944).

the accuracy of industry figures on *proved* natural gas reserves. In addition, we find that an area rate proceeding, bringing together as it does sharply divergent economic interests in the same arena to do battle, provided an excellent context in which to resolve such an issue. The record clearly indicates that *So La II* was conducted in an adversarial environment wherein third parties with adverse economic interests participated at all stages of the proceedings.

Having concluded that the application of collateral estoppel would be appropriate in this case, we turn now to the essentially factual question whether the Power Commission actually did determine an issue which the Trade Commission now seeks to relitigate. We note that on this matter our scope of review is narrower; we may reverse the District Court's determination only if it is clearly erroneous.[21] The Trade Commission in its briefs never directly argues that the Power Commission did *not* actually determine the accuracy of AGA figures. Rather, the Trade Commission contends that the Power Commission only determined that AGA figures were appropriate for its use in the determination of just and reasonable rates. The Trade Commission seeks to determine whether the producers are underreporting reserves and are thus violating the FTCA. We agree with ap-

[21] Rule 81(a)(3), F.R.Civ.P., provides that Federal Rules of Civil Procedure "apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . . ." We are thus bound by Rule 52(a), which states that "[f]indings of fact shall not be set aside unless clearly erroneous . . . ."

Another requirement for the application of collateral estoppel is that "the issue in the prior action must have been necessary and essential to the resulting judgment." 1B *Moore's Federal Practice* ¶ 0.443[1] (1974). The FTC has not argued this issue in this appeal.

pellees that the distinction is illusory. "[T]he FTC's very theory is that there is antitrust significance in reporting misleading reserves data *because* rates were affected." [22]

The District Court probed counsel for the Trade Commission on this point several times. At some points counsel argued that it wanted reserve estimates because it was investigating "possible collusive conduct by the natural gas producers in the reporting of these reserves." [23] In this regard, the District Court explicitly stated in its order that the producers must produce all documents passing *inter se* or with the AGA.[24] At other points the argument appears to be what we set out above.

There can be no question that the Trade Commission has jurisdiction to determine whether the antitrust laws or the FTCA has been violated. However, the District Court was entitled to conclude on the present record (1) that the Trade Commission desired all reserve data in the possession of appellees in order to recompute independently Southern Louisiana reserves, and (2) that the Power Commission, on the basis of a contested evidentiary hearing, had found that the industry's figures for Southern Louisiana reserves for the relevant years were accurate. Based on these findings, the District Court could reasonably have concluded that it would be unjust and unreasonable to require the production of every scrap of data which related to reserves *of any kind*. By limiting production to "documents containing or underlying *proved* natural gas reserve estimates," the court has drawn a reasonable balance between the investigatory

[22] Common Counsel Brief, p. 25 n. 49.

[23] App. II 352a.

[24] See ¶ 3(b) of the six producers order. Reproduced as Appendix B.

needs of the Trade Commission and the producers' claims arising out of the prior Power Commission investigations.

D. *The Bid Files*

Among the documents which would be liable to disclosure under specifications G, H, and I would be the producers' bid files. The bid files include information which producers assemble *in advance* of an oil lease bid. The information is based upon *limited* geophysical information and usually not upon actual exploration. The producers consider the models they have developed for making lease bids the most valuable trade secrets they own, because of the large outlays which have gone into their development and the ease with which any producer could be outbid on leases if its competitors had access to the model.[25] The producers assert that data contained in a bid file would give a competitor easy access to their bid models and understandably strongly argue against disclosure.

The producers argue that the bid files are not relevant to any calculation of *proved* reserves, because the bids files only contain speculative estimates of producing capacity based on limited information. Once a producer obtains a lease and thus is able to drill exploratory wells, these bid estimates are no longer used by the company (except presumably to improve their bidding model or to analyze the bidding behavior of opponents). As a result, producers contend that the bid files could not be relevant to an investigation into conspiratorial and other practices to underreport *proved* reserves.

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[25] Mobil Oil Co. refers us in its brief to "the all too frequent cases in which such information has been stolen and sold for large sums of money. *See, e.g., Tlapek* v. *Chevron Oil Co.*, 407 F.2d 1129 (8th Cir. 1969); *Abbott* v. *United States*, 239 F.2d 310 (5th Cir. 1956); *Hunter* v. *Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952); *Ohio Oil Co.* v. *Sharp*, 135 F.2d 303 (10th Cir. 1943)." Brief of Mobil Oil Co., p. 27.

The Trade Commission on the other hand argues that "[t]he 'bid files' contain estimates of reserves, no matter how speculative or untested, and as such, are plainly relevant to the analysis of gas reserve reporting which is part of the Commission's investigation." [26] The Trade Commission adds in a footnote that the FTCA gives it the authority to report to Congress and that it therefore should be permitted to gather information for that purpose as well as for the more limited purpose of individual cease-and-desist orders.

The Supreme Court in *Oklahoma Press Publishing Co.* v. *Walling* [27] clearly indicated that the District Court must consider in an enforcement proceeding whether the documents sought by an administrative subpoena are relevant to the agency's inquiry. The judicial function in this regard is to be considered "neither minor nor ministerial." [28] Because such a question is essentially factual in nature, we must defer to the District Court's finding unless we can conclude that its determination was clearly erroneous.

The evidence and argument presented to the District Court permitted it to conclude that the producers' bid file contained highly speculative estimates, which would be rapidly superseded by much sounder estimates, once the winning bidder could begin drilling. After the first well is drilled on a lease, no company relies on bid file data, nor is such data ever reported to the AGA. Only data relevant to *proved* reserves is reported, and the essential ingredient in the definition of "proved reserves" is that the data is obtained by drilling, by penetration

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[26] Appellant's Reply Brief, pp. 9-10.

[27] 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

[28] 327 U.S. at 217, n. 57, 66 S.Ct. 494.

of the formation.[29] The "proved reserves" definition is accepted by the industry, the Power Commission, and the Trade Commission here. Thus, even if the bid file data showed a gross disparity compared to the data on *proved* reserves submitted to the AGA, this would prove nothing except that the company's original bid estimates were sadly in error, for by definition the *proved* reserves data must be based on geological information obtained by drilling at a later time than when the bid data is assembled. The preliminary data has no relevance whatsoever in showing whether the preliminary estimates of reserves should later be moved to the strictly defined category of "proved reserves." [30]

The Trade Commission makes one final argument, that companies sometimes delay drilling in order not to acquire any proved reserve data which they would be obligated to turn in to the AGA. Aside from the dubious wisdom (and likelihood) of a petroleum company paying millions of dollars and then permitting the lease to go untested, the District Court judiciously added the following caveat:

> If you can later come back to me with a situation where a company has been awarded a bid on a property and has delayed an unreasonable time in drilling on it so they could come up with a proper estimate, then you may apply and I will consider giving you the bid file on that particular one.[31]

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[29] *See* note 2, *supra*.

[30] There is no consistently used or accepted definition for reserves other than "proved reserves." Various companies describe their data, at different stages, as "probable," possible," "recoverable," and "ultimately recoverable."

[31] App. II 431a.

We therefore affirm the District Court's finding that the bid materials were not relevant [32] at the present time to the Trade Commission's inquiry and the related modification contained in paragraph 2(a) of its six producers' order.

III. *Random Sampling and Time Limitations*

The Trade Commission argues that the District Court should have required complete disclosure of all proved reserve data in the Southern Louisiana area back through 1962. Instead, the court ordered disclosure (1) of proved reserve data for a random sample of 100 fields out of the 220 in Southern Louisiana (2) for the years 1969, 1970, and 1971.

It is well established that an enforcing court may limit through modification or partial enforcement subpoenas it finds to be unduly burdensome.[33] Such modi-

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[32] We noted earlier that the District Court had not reached the issue of relevance with regard to the overall category of documents that do not relate to proved reserves. Page 144. Although logically the bid files fall within this category, throughout these proceedings they have been treated and discussed as if they were a discrete class of documents. The Record indicates that the District Court gave separate consideration to the bid files and ultimately based the relevant portions of the final order on a finding that the bid files lacked relevance. App. 431a.

[33] *SEC* v. *Brigadoon Scotch Dist. Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915, 94 S.Ct. 1410, 39 L.Ed.2d 469 (1974); *Adams* v. *FTC*, 296 F.2d 861, 866-67 (8th Cir. 1961), *cert. denied*, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83 (1962); *Hunt Foods & Industries, Inc.* v. *FTC*, 286 F.2d 803, 811 (9th Cir. 1960), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961); *Chapman* v. *Maren Elwood College*, 225 F.2d 230 (9th Cir. 1955); *Comet Electronics, Inc.* v. *United States*, 381 F.Supp. 1233, 1242 (W.D. Mo. 1974), *affirmed*, —— U.S. ——, 95 S.Ct. 1439, 43 L.Ed.2d 758 (1975); *Genuine Parts Co.* v. *FTC*, 313 F.Supp. 855, 857

fication or partial enforcement is an exercise of the District Court's sound discretion and will only be overturned on appeal for abuse of discretion.[34]

With respect to the random sampling, the Trade Commission's position is that

> Such a limitation and sampling would make impossible any comparison of the total data supplied by producers who have fully complied with the subpoenas with the limited data which would be forthcoming from producers who supplied documents on only a random and numerically limited basis. Similarly the comparison with all the data submitted to the AGA for this region would be foreclosed.
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> . . . Clearly the requirement that the Commission resort to a random sample of 100 fields would preclude any possibility of making a reasonable evaluation of natural gas reserves or checking the accuracy of estimates of natural gas reserves for Southern Louisiana.[35]

On either theory of its investigation the Trade Commission's argument is unconvincing. If the Trade Commission is looking for an antitrust conspiracy, a random sample made up of data from 45% of the relevant fields should be adequate to turn up evidence of a conspiracy (if there is evidence to be turned up). If the FTC is investigating whether either the industry-wide definition of proved reserves or the manner of reporting such re-

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(N.D. Ga. 1970), *affirmed*, 445 F.2d 1382 (5th Cir. 1971); *In re United Shoe Machinery Corp.*, 6 F.R.D. 347 (D. Mass. 1947). *See also See* v. *Seattle*, 387 U.S. 541, 544, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967).

[34] *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731, 66 S.Ct. 39, 90 L.Ed. 435 (1945).

[35] Appellant's Brief, p. 48.

serves is an unfair trade practice, we fail to see how a random sample of data from 45% of the fields would be inadequate. A random sample permits comparisons between producers or between producers and the AGA figures, especially since the FTC already has the AGA's complete field-by-field figures.[36] The District Court was entitled to conclude on the record before it that disclosure of data from all 220 fields would be burdensome, and that use of a random sample would neither preclude a reasonable evaluation of the manner in which reserves are estimated nor prohibit the Commission from checking the data as to its accuracy. We therefore affirm this aspect of the District Court's order.

On the other hand, the reasons for limiting disclosure to documents prepared during 1969, 1970, and 1971 are not as apparent to us. The Trade Commission's investigation was triggered, at least in part, by the drop in 1968 and 1969 of proved reserves as reported by the AGA. The Commission would thus appear to need data for a period of time preceding the reported drop in reserves in order to make comparisons. In this regard, we find the Commission's request for disclosure under specifications G, H, and I back through 1962 to be appropriate. We therefore conclude that the District Court's failure to require such disclosure is an abuse of discretion and must therefore be reversed.

IV. *Confidentiality and Production at Situs*

The District Court attached the following conditions upon the disclosure of documents designated as confidential:

(1) The Secretary of the Federal Trade Commission is designated the custodian of the documents;

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[36] *See* note 4 and accompanying text.

(2) The documents (and presumably any documents or memoranda derived therefrom) must be kept in a depository with access restricted to the FTC employees assigned to the investigation;

(3) Documents can only be removed from the depository or used for other purposes with the court's permission; and

(4) Upon the termination of the investigation, the documents (and presumably all copies of documents) must be returned to their owner.

The Trade Commission does not question the confidential nature of the documents it seeks disclosed. Rather, its position is that the FTCA and the Commission's Rules of Practice provide appellees with adequate protection. In fact, the FTCA and the Rules of Practice merely state that the public disclosure of geophysical data or information and trade secrets is within the discretion of the Commission. 16 C.F.R. 4.11(d) clearly indicates that the Trade Commission will decide ultimately whether records exempt from disclosure under the Freedom of Information Act (as most of these records probably would be) will be disclosed.

The District Court was not required to rely on the unbounded discretion of the Trade Commission to keep the producers' estimates confidential.[37] In addition, we fail to see how the minor procedures imposed by the Court will impose any substantial burden on the Com-

[37] *See* note 4, *supra*. The action of the Trade Commission, in acceeding to the telephoned demand of a Congressman for immediate access to the documents in so short a period of time as to preclude resort to a court, underlines the wisdom and reasonableness of the District Court's protective order on confidentiality. The Federal Rules of Civil Procedure currently provide for motions to quash duly authorized subpoenas, but not phone calls.

mission's investigation. We therefore hold that the District Court did not abuse its discretion when it attacked the conditions listed above to the disclosure of information by all seven appellees.[38]

The Trade Commission also complains about the option permitting the production of documents for inspection where they are stored. The Supreme Court in *CAB* v. *Hermann* upheld the enforcement of a subpoena "with appropriate provisions for assuring the minimum interference with the conduct of the business of respondents." [39] The Second Circuit has also upheld a similar provision. It noted that "[r]equiring records to be produced away from the place where they are ordinarily kept may impose an unreasonable and unnecessary hardship which in itself would make the issuance of the subpoena, otherwise proper, arbitrary and capricious." [40] Since the number of documents to be produced will be quite large, it is not inappropriate to relieve appellees of some of the expense and burden entailed by permitting them the option of producing documents where they were stored.[41] It would then be the responsibility of the Trade

[38] In order to protect confidential commercial information and trade secrets, District Courts frequently have required appropriate protection as a precondition to enforcement of FTC investigative subpoenas. *See, e.g., FTC* v. *St. Regis Paper Co.*, 304 F.2d 731, 732 n. 1 (7th Cir. 1962); *Graber Mfg. Co.* v. *Dixon*, 223 F.Supp. 1020 (D.D.C. 1963); *FTC* v. *Bowman*, 149 F.Supp. 624 (N.D. Ill.). *aff'd*, 248 F.2d 456 (7th Cir. 1957); *FTC* v. *Menzies*, 145 F.Supp. 164, 171 (D. Md. 1956), *aff'd*, 242 F.2d 81, 84 (4th Cir.), *cert. denied*, 353 U.S. 957, 77 S.Ct. 863, 1 L.Ed.2d 908 (1957).

[39] 353 U.S. 322, 323, 77 S.Ct. 804, 805, 1 L.Ed.2d 852 (1957).

[40] *Walling* v. *American Rolbal Corp.*, 135 F.2d 1003 (2nd Cir. 1943).

[41] The Trade Commission's arguments notwithstanding, it is common for a District Court to require the administrative agency to inspect subpoenaed records or documents at the

Commission to copy and transport to Washington any documents they consider useful. We affirm the District Court as to the *in situs* condition.

V. *The Superior Order*

The Commission concedes that Superior does not report reserve estimates to, or participate in, the work of the AGA. Since the FTC issued identical subpoenas to all producers, it was obvious to the District Court that several specifications, those relating to reporting and participating in the AGA, were not relevant to Superior. As a result, the District Court simply refused to enforce specifications G through J. In all other respects Superior will be required to provide the Commission with the same documents and information that is being required of the other six producers, subject to the confidentiality protections previously discussed. We affirm this order.

VI. *Conclusion*

In the last analysis a petition for enforcement of an administrative subpoena *duces tecum* must be judged by the District Court on a case-by-case basis. Because questions of relevance and burdensomeness are peculiarly within the ken of the trial court, appellate tribunals should be wary of second-guessing. In our view, the District Court's orders represent a just and fair accommodation between the Trade Commission and the producers.

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place where they are stored. *NLRB* v. *Friedman*, 352 F.2d 545 (3rd Cir. 1965); *Hunt Foods & Industries, Inc.* v. *FTC*, *supra*, 286 F.2d at 812. *FTC* v. *Bowman*, *supra*, 149 F.Supp. at 630; *FTC* v. *Menzies*, *supra*, 145 F.Supp. at 171.

To summarize, we have affirmed the District Courts' order in all respects save one, the time limitation in paragraph 2 of the six producers' order.

Affirmed in part and reversed in part.

See Appendix on next page.

APPENDIX A

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

To Mr. A. C. Long, Chairman Executive Committee & Chief Executive Officer, Texaco, Inc., 135 East 42nd Street, New York, New York 10017.

You are hereby required to appear before Donald K. Tenney, an Attorney and Examiner of the Federal Trade Commission, at Room 368, Federal Trade Commission Building, 6th and Pennsylvania Avenue, N.W., in the City of Washington, D.C. 20580 on the 5th day of January, 1972, at 10:00 a.m., to testify in connection with the Commission's investigation of various corporations and persons, File No. 711 0042, pursuant to Commission Resolution dated June 3, 1971, a copy of which is attached and made a part hereof, for the purposes stated therein.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

See attached "Definitions" and "Specifications."

Fail not at your peril

In testimony whereof, the undersigned, an authorized official of the Federal Trade Commission, has hereunto set his hand and caused the seal of said Federal Trade Commission to be affixed at Washington, D.C., this 24th day of November, 1971.

[SEAL]

/s/ _____
Assistant Director
Bureau of Competition

DEFINITIONS

As used herein, the term "documents" means all writings of every kind including books, records, folios, minutes, reports, memoranda, correspondence, agreements, discounted cash flow studies, cover sheets, calculation sheets, print outs, telegrams, diary entries, pamphlets, notes, charts, and tabulations in the possession, custody or control of the Company. The term "documents" also includes voice recordings and reproductions or film impressions of any of the aforementioned writings as well as copies of documents which are not identical duplicates of the originals and copies of documents of which the originals are not in the possession, custody or control of the Company. The term "documents" further includes all punch cards or other cards, tapes or recordings used in data processing, together with the programming instructions and other written material necessary to understand or use such punch cards, tapes or other recordings.

In response to specifications in which the term "documents" is followed by an asterisk (*), a verified written statement by an officer of the company containing the requested information may be submitted in lieu of the documents called for provided that the underlying documents or source materials are listed or otherwise specifically identified in, or as part of, such verified statement.

Each document submitted must be identified as to the specification or specifications to which it is responsive.

The term "the Company" means the corporation upon which this Subpoena was served as well as its directors, officers, employees, and agents; its subsidiaries and affiliates; and the directors, officers, employees and agents of its subsidiaries and affiliates. The term "the corporation" means the corporation upon which the Subpoena was served.

Unless otherwise stated, the following definitions apply to the specifications that ensue:

1. *South Louisiana.* That geographical area delineated by Map III, page 84, of the May, 1971 edition of *Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity as of December 31, 1970* including the offshore area. The term "Offshore South Louisiana" is defined as that geographic area which lies seaward from the Louisiana coastline. The South Louisiana Offshore Area is sometimes referred to as Federal Areas 1 through 4 and includes the West Cameron Area, East Cameron Area, Vermillion Area, South Marsh Island Area, Eugene Island Area, Shoal Area, South Pelto Area, Bay Marchand Area, South Timbalier Area, Grand Isle Area, West Delta Area, South Pass Area, Main Pass Area, Breton Sound Area, Chandeleur Area and Chandeleur Sound Area and any additions thereto, as indicated on the United States Geological Survey "Oil and Gas Development Map of the Gulf Coast State of Louisiana Outer Continental Shelf", as revised on January 5, 1971.

2. *Net Production.* The definition appearing in *Technical Report No. 1*, Standard Definitions for Petroleum Statistics (First Edition, July 1, 1969), at page 11, is adopted.

3. *Natural Gas Present or Recoverable or Ultimately Recoverable.*

a. *Present.* Natural Gas in place, i. e., existing either in the gaseous phase or in solution with crude oil in a natural underground reservoir or reservoirs.

b. *Recoverable.* Natural gas in place that is producible.

c. *Ultimately recoverable.* Natural gas in place that is producible, together with its cumulative production.

4. *Field.* A field is an area consisting of a single reservoir or multiple reservoirs all grouped on, or related to, the same individual geological features and/or stratigraphical condition. A reservoir is a porous and permeable underground formation containing an individual and separate natural accumulation of hydrocarbons (oil and/or gas) which is confined by impermeable rock or water barriers and is characterized by a single natural pressure system.

5. *Completion Date.* The first date on which any permanent equipment for the production of oil or gas is installed in a well. Completion reports may relate to the abandonment of a well or to the installation of permanent productive equipment.

6 & 7. *Associated Gas; Dissolved Gas.* The definitions of these two terms that appear in *Technical Report No. 1*, Standard Definitions for Petroleum Statistics (First Edition, July 1, 1969), page 6, are adopted.

8. *Nonassociated Gas.* Natural gas which is in a reservoir or reservoirs not containing significant quantities of crude oil.

9-13. *Proved Reserves; Revisions; Extensions; New Field Discoveries;* and *New Reservoir Discoveries in Old Fields.* The definitions of these five terms that appear in *Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity as of December 31, 1970* at pages 102-104, are adopted.

14. *Dedicated Reserves.* The volume of natural gas committed to a pipeline company and for which both the seller and the pipeline company have received certificate authorization from the Federal Power Commission.

SPECIFICATIONS

A. Documents * which will indicate the correct legal name and business address of the corporation, its date and state of incorporation, and the name, position and home address of each officer and director of said corporation.

B. Documents * which will indicate the correct legal name and business address of the parent of the corporation, the date and state of incorporation of the parent and the percentage ownership the parent has in the corporation, and the name, position and home address of each officer and director of the parent.

C. The corporation's Annual Reports for each of the years 1966, 1967, 1968, 1969 and 1970.

D. Documents * which will indicate the name and address of each subsidiary, affiliate, and division of the corporation and of the divisions of each such subsidiary and affiliate engaged in the exploration, development, production, or distribution of natural gas; the function(s) as heretofore set forth of each; and the dates and states of incorporation and the names, positions, and addresses of officers, directors, managers of each subsidiary, affiliate, and division.

E. Documents * which will indicate (1) each type of customer purchasing natural gas, produced in South Louisiana, from the corporation, its subsidiaries and affiliates and (2) the manner and methods of distribution of such natural gas to each such type of customer.

F. Documents * which will indicate the following for each of the years 1966 through 1970:

1. Total net production of natural gas, in units, in (a) the United States and (b) South Louisiana, by the corporation, its subsidiaries and affiliates.

2. Total unit and dollar volume of sales of the total net production of natural gas produced in (a) the United States and (b) South Louisiana, by the corporation, its subsidiaries and affiliates.

3. Total dollar volume of sales of the total net production of natural gas produced in South Louisiana by the corporation, its subsidiaries and affiliates to each type of customer identified in Specification E(1)—for 1969 and 1970 only.

G. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time between January 1, 1962 to December 31, 1970, which contain estimates or evaluations of the volume of natural gas present or recoverable or ultimately recoverable (1) throughout all of South Louisiana (2) throughout all of Offshore South Louisiana and/or (3) in specific fields, portions of fields, leaseholds and/or portions of leaseholds located in Offshore South Louisiana.

Excluded from this specification are any documents previously made available to the Commission by the American Gas Association and presently in the custody of Price, Waterhouse & Company, 1801 K Street, Washington, D.C. Included in this specification by way of illustration but not limitation are documents containing estimates or evaluations including re-estimates or re-evaluations made in connection with or in preparation for or as the result of the following: (1) bidding on or nominating leases (2) deciding whether to erect permanent platforms (3) compiling or inventorying total company reserves or supply (4) negotiating or contracting for the sale of natural gas, or for the joint or common exploration, development, production, purchase or sale of acreage, or for obtaining bank loans (5) filing depreciation expense schedules with Internal Revenue Service or (6) submitting field-by-field estimates to subcommittees

or committees of the American Gas Association or the American Petroleum Institute.

H. Documents * indicating any or all of the following with regard to each field and leasehold in Offshore South Louisiana for which estimates or evaluations of the volume of natural gas, pertaining to the whole or a portion thereof, are produced pursuant to Specification G:

1. For each such field and portion thereof, its name and the number(s) of each block number comprising said field or portion thereof—if the field or field portion is situated at least in part in a portion of a block, the portion of the block as well, e. g., "NW ¼";

2. For each such leasehold and portion thereof, the OCS number and the name(s) and location(s) of the field(s) and portion(s) thereof comprising such leasehold or portion thereof;

3. The pipeline company(ies) serving each such field, leasehold, or portion thereof;

4. The producer(s) and the operator(s) of each such field, leasehold, or portion thereof, indicating the precise interest each such producer and operator has in the acreage;

5. For each such field, leasehold and portion thereof, the location (on a map) and designation of each well drilled including (for each such well):

a. The current status as classified by the Company, e. g., "dry and abandoned", "temporarily abandoned", "suspended", "shut-in", "service", "producer", etc.;

b. Whether classified by the Company as an oil or gas well at the time of (1) application for drilling (2) the filing of each completion report (3) currently;

c. The number of reservoirs containing natural gas that have been penetrated by the well;

d. The date drilling commenced; the date total depth was reached; first date of testing; first date of testing officially reported; completion date; date commenced producing.

I. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1962, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. Any natural gas estimates or evaluations called for by Specification G; the preparation or completion of such estimates or evaluations; the procedures, criteria or interpretations used in such preparation or completion; the identity of organizational units and personnel of the Company involved in such preparation or completion;

2. Any natural gas estimates or evaluations made available to the Commission by the American Gas Association and presently at Price, Waterhouse & Co., or appearing in any American Gas Association Report on Natural Reserves, published subsequent to January 1, 1967, including the constituent categories of these estimates such as "proved reserves", "revisions", "extensions", "new field discoveries", "new reservoir discoveries in old fields"; the preparation or completion of such estimates or evaluations; the procedures, criteria or interpretations used in such preparation or completion; the organizational units and personnel of the Company involved in such preparation or completion;

3. Any lease nominations and bids, any agreements for joint or common leasing, exploration, development, production, purchase or sale, or any cash

flow or economic feasibility studies preparatory to leasing, exploring, developing, purchasing or selling, which involve Offshore South Louisiana acreage;

4. Any compilation, report or study of "dedicated reserves";

5. Whether any well designated in response to Specification H-5 contains natural gas in sufficient quantities as to be capable of producing in paying quantities.

J. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1966, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. Any failures or delays, for whatever reason, in reporting proved reserves of natural gas to the American Gas Association, including any failures or delays by personnel of the Association to identify to subcommittee members all fields containing proved reserves;

2. The classification or exclusion or inclusion of volumes of natural gas as proved reserves;

3. The relationship between increases or decreases of crude oil proved reserves with increases or decreases of associated, dissolved or associated-dissolved natural gas proved reserves;

4. Negative revisions to American Gas Association proved reserve estimates because of clerical or mathematical error.

K. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1962, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. The relation between the amount of "proved reserves" and the rate allowed, to be allowed, or that may be allowed for natural gas by the Federal Power Commission;

2. The reporting of lower "proved reserve" figures.

L. Documents * naming all employees of the corporation, its subsidiaries and affiliates who have, any time since January 1, 1966 with regard to Offshore South Louisiana, estimated, evaluated or enumerated natural gas proved reserves, dissolved gas proved reserves, potential gas supply or well drilling activity either for the American Gas Association, American Petroleum Institute, Potential Gas Committee, American Association of Petroleum Geologists or the International Oil Scouts, including local scout checks, indicating for each person named (1) the association for which he estimated or enumerated (2) whether a member of the association (3) what was estimated or enumerated and (4) the dates for which he estimated or enumerated for the particular association.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1089-73

FEDERAL TRADE COMMISSION

v.

TEXACO, INC.

Civil Action No. 1090-73

FEDERAL TRADE COMMISSION

v.

STANDARD OIL CO. (INDIANA)

Civil Action No. 1092-73

FEDERAL TRADE COMMISSION

v.

EXXON CORPORATION

Civil Action No. 1093-73

FEDERAL TRADE COMMISSION

v.

SHELL OIL COMPANY

Civil Action No. 1095-73

FEDERAL TRADE COMMISSION

v.

STANDARD OIL CO. OF CALIFORNIA

Civil Action No. 1096-73

FEDERAL TRADE COMMISSION

v.

MOBIL OIL CORPORATION

ORDER

The Federal Trade Commission ("Trade Commission") having petitioned on June 13, 1973, for enforcement of subpoenas *duces tecum* issued by an Assistant Director of the Trade Commission's Bureau of Competition to each of the above captioned respondents on November 24, 1971, in the course of a Trade Commission investigation into natural gas reserves reporting procedures (FTC Investigation File No. 711 0042); and the respondents having opposed enforcement of said subpoenas, contending that the principles of primary jurisdiction and collateral estoppel preclude the Trade Commission from seeking the demanded documents or data for purposes of determining the validity or accuracy of natural gas reserve estimates, and contending further, *inter alia*, that certain demands of the subpoenas are irrelevant to any proper subject or area of investigation and are unduly broad and burdensome; and the parties having fully briefed and presented oral argument on the issues; and the Court upon consideration of all the premises, being of the opinion that the Trade Commission is authorized to pursue the investigation to determine whether there exists any evidence of conspiracy in the reporting of proved natural gas reserve estimates to the American Gas Association by respondents, but that the subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters

already considered and ruled upon by the Federal Power Commission, and the Court being of the further opinion that the subpoenas are improper in other respects as well and should not be enforced as issued:

It is now therefore ordered:

1. Enforcement of specifications A, B, C, D, E, and F of the subpoenas *duces tecum* is hereby granted. Enforcement of specifications G, H, I, J, K, and L is hereby denied except as provided below.

2. Respondents shall produce documents as called for by specifications G, H, and I of the subpoenas *duces tecum* for the years 1969, 1970 and 1971, subject to the following modifications and limitations:

(a) Production shall be limited to documents containing or underlying proved natural gas reserve estimates. Raw field data, bid calculation data, and bid calculation files are not required to be produced. As regards underlying back-up data for each estimate called for by specification G, only the immediate data used to make the estimate need be submitted. For estimates arrived at volumetrically, specification I(1) will be satisfied by supplying all the underlying numbers which were used in the formula including the recovery factor and the size of the reservoir(s). As for the estimates arrived at by pressure decline curves, specification I(1) will be satisfied by submitting the curve used.

(b) Production of documents shall be made with respect only to a random sample of 100 of those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves. This random sample shall be selected by a procedure agreed upon between Trade Commission and respondents.

(c) Each respondent shall make production with respect to the fields, selected in the manner described in paragraph 2(b), in which it had an ownership interest as of the date reports were submitted by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

(d) All production ordered pursuant to this paragraph 2 shall be made for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves.

3. Respondents shall produce documents as called for by specifications J and K of the subpoenas *duces tecum*, subject to the following modifications and limitations:

(a) Production shall be limited to documents relating to proved natural gas reserve estimates in those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

(b) Production shall be limited to documents prepared or dated during the years 1966 through 1971, inclusive, which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondent or others, including the American Gas Association.

4. Respondents shall produce documents as called for by specification L, except production shall be limited to the employees who have acted with respect to proved natural gas reserve estimates for offshore Southern Louisiana during the year 1966 through 1971, inclusive.

5. In complying with this Order, the definition of terms contained in the original subpoenas *duces tecum* shall apply.

6. Respondents shall comply with this Order within 180 days after the date upon which they are advised of the sample fields selected in accordance with paragraph 2(b) hereof.

7. Each respondent shall have the option of producing documents called for by this Order at the corporate office or field location where the responsive documents are normally maintained or at the Federal Trade Commission's offices in Washington, D. C. With respect to documents as to which any respondent elects to make production at a corporate office or field location, the Trade Commission shall inspect and reproduce any of said documents at such office or field location at, such other location as agreed upon by the respective parties, and shall bear any costs of reproduction or copying which the Trade Commission may require or desire.

8. Any document produced under this Order which contains confidential information may be designated as being confidential by the respective respondents, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in con-

nection with said investigation, and said employees shall not suffer or permit disclosure or copying of any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respective respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

9. The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

So ordered this 22nd day of March, 1974.

/s/ George L. Hart, Jr.
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1091-73

FEDERAL TRADE COMMISSION

v.

SUPERIOR OIL COMPANY

ORDER

Upon consideration of the Federal Trade Commission's petition for enforcement of a subpoena *duces tecum*, the matter having been fully briefed and argued before the Court, and the Court being advised in the premises, it is this 22nd day of March, 1974,

ORDERED, That the respondent, The Superior Oil Co., Inc., shall comply, within 180 days from the date on which this Order becomes final, with Specifications A through F and K through L of the subpoena, provided that Specifications A, B, D, E and F may be complied with by submitting a verified written statement by an officer of the Company containing the requested information in lieu of the documents specified, and it is

FURTHER ORDERED, That as to the respondent, The Superior Oil Co., Inc., Specifications G through J of the subpoena be, and the same hereby are, denied enforcement and quashed; and it is

FURTHER ORDERED, That any document produced under this Order which contains confidential information may be designated as being confidential by the respondent, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

So Ordered This 22 Day of March, 1974.

George L. Hart, Jr.
George L. Hart, Jr.
Chief Judge

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of

STANDARD OIL COMPANY (NEW JERSEY)

File No. 711 0042

ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUM

Upon consideration of the motion to quash and accompanying requests filed in the above matter on December 23, 1971 and February 1, 1972, through counsel, by Standard Oil Company (New Jersey), the Commission, for the reasons set forth in the accompanying opinion, has determined that said motion and requests be denied. Accordingly,

IT IS ORDERED that movant's (a) motion to quash subpoena duces tecum, (b) request for access to staff memoranda, comments or recommendations in support of the subpoena, (c) request for permission to reply to said staff memoranda, comments or recommendations, and (d) request for oral argument, be, and they hereby are, denied.

By direction of the Commission.

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

ISSUED: June 27, 1972

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of

THE AMERICAN GAS ASSOCIATION, INC., et al.

File No. 711 0042

OPINION OF THE COMMISSION

This matter is before the Commission on motions of the eleven companies subpoenaed, filed with the Secretary, to quash subpoenas duces tecum. The subpoenas were issued pursuant to Commission resolution dated June 3, 1971, which directed the use of compulsory process in a nonpublic investigation to determine whether petitioners and other persons and corporations, individually or in concert, are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act. The subpoenas were signed by Owen M. Johnson, Jr., Assistant Director, Bureau of Competition.

The combined arguments of the subpoenaed corporations allege in support of the motions that:

(1) exclusive and primary jurisdiction in the area of the investigation rests with the Federal Power Commission, which is currently exercising that power; the petitioners' actions, even if collective, are protected from antitrust attack by the *Noerr-Pennington* doctrine; the Commission should terminate, or alternatively, stay its nonpublic investigation of the reporting of natural gas reserves for Southern Louisiana;

(2) the demands of the subpoena are unduly broad, vague, burdensome and irrelevant;

(3) the Commission has failed to comply with the requirements of the Federal Reports Act of 1942;

(4) the documents are confidential, and not adequately protected from disclosure by the Commission's procedures;

(5) the resolution fails to advise petitioners of the scope and purpose of the investigation;

(6) delegation to an Assistant Bureau Director of authority to issue subpoenas is unlawful;

(7) the Commission's Rules of Practice deny witnesses the right to adequate representation by counsel, as guaranteed by the Constitution and the Administrative Procedure Act;

(8) the subpoena requires production of documents under the control and possession of petitioners' subsidiaries and affiliates, which petitioners have no right to produce.

A number of petitioners also request permission to obtain copies of and to reply to any memoranda, comments or recommendations of the Commission's staff in support of the subpoena, and opportunity to present oral argument. Many also request an extension of time to

comply with the subpoena, and reserve the right to seek protective orders. One petitioner requests substitution of parties responding to the subpoena.

Exclusive and Primary Jurisdiction in the Area of the Investigation Rests with the Federal Power Commission, which is Currently Exercising that Power

Petitioners contend that this Commission is precluded from conducting the present investigation because the investigation represents duplication of Federal Power Commission efforts. The Commission's investigation, however, is targeted on possible violations of the antitrust laws and Section 5 of the Federal Trade Commission Act—activities over which the Federal Power Commission lacks jurisdiction. *California* v. *Federal Power Commission*, 369 U.S. 482 (1962).

The Natural Gas Act, 15 U.S.C. §§ 717 et seq. (1963), grants the Federal Power Commission jurisdiction to establish just and reasonable rates for natural gas companies and to certify mergers between such companies. 15 U.S.C. § 717c, d and f. The Act does not expressly immunize gas producers subject to Federal Power Commission jurisdiction from the antitrust laws. It also does not authorize the Federal Power Commission to enjoin unfair methods of competition or unfair or deceptive acts or practices. The Act clearly does not confer authority upon the Federal Power Commission to proceed against conspiracies or practices which may constitute unfair or deceptive acts or practices. When the Federal Power Commission encounters an antitrust violation, it "may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings." 15 U.S.C. § 717s(a). Thus, while the Federal Power Commission may enjoin or modify rates

it has approved, it may not approve of the acts of conspirators and it may not enjoin a conspiracy. The ratemaking authority of the Federal Power Commission is insufficient to cure violations of the antitrust laws.

This Commission, on the other hand, is specifically charged with enforcement of antitrust laws, both through the Clayton Act and through the broad jurisdictional grant of Section 5 of the Federal Trade Commission Act.

It is well settled that exceptions from the antitrust laws must be specific, and that repeals of authority by implication are not favored. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945). Where, as here, there is neither exemption nor immunity granted to the natural gas companies, none should be read into the statutes. Clearly, a reasonable rate approved by the Federal Power Commission is legal even though it may be demonstrable that the rate was fixed through concerted action by the producers. Despite the legality of the rate, however, any alleged underlying conspiracy is not beyond the reach of a specific grant of authority to enforce the antitrust laws. See *California* v. *Federal Power Commission*, *supra*; *United States* v. *R.C.A.*, 358 U.S. 334 (1959); *Georgia* v. *Pennsylvania R. Co.*, *supra*; *United States* v. *Borden Company*, 308 U.S. 188 (1939); *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922).

It is clear, therefore, that in the absence of an express exemption or immunity either in statutes or in court decisions, the Federal Trade Commission, as an agency charged specifically with the duty to enforce the antitrust laws, may proceed against alleged antitrust violations although another body may, even must, consider the same underlying facts for different purposes. In the well-known Federal Trade Commission case of *American*

Cyanamid Company v. *Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), the court held that the requirement of the Patent Office to consider the truthfulness of representations before it, in granting or denying applications, did not preclude the Federal Trade Commission from investigating alleged fraudulent misrepresentations to the Patent Office if such misrepresentations would violate the Federal Trade Commission Act. Thus, the fact that the Federal Power Commission considers reserve estimates and procedures in its ratemaking function does not preclude this Commission from investigating the same estimates and procedures in an investigation of possible violations of Section 5 of the Federal Trade Commission Act, unless it constitutes part of a "regulatory scheme."

The mere duty of the Federal Power Commission to consider antitrust policies in the setting of rates has been held not to constitute part of a regulatory scheme, and not sufficient to displace the antitrust laws. *California* v. *Federal Power Commission*, *supra*. Those agencies and courts with specific authority to enforce antitrust laws have primary jurisdiction in proceeding against antitrust violations. *United States* v. *R.C.A.*, *supra*; *Georgia* v. *Pennsylvania R. Co.*, *supra*; *Silver* v. *New York Stock Exchange*, *supra*. As the Supreme Court said in *United States* v. *R.C.A.*, *supra*:

> "At the same time, this Court carefully noted that the doctrine [of primary jurisdiction] *did not* apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures or a regulatory scheme." (*Id.* at 347; emphasis added.)

Clearly, on the basis of the foregoing authorities, this Commission has jurisdiction to conduct an investigation of alleged antitrust violations by gas producers. There is

no express exemption or immunity from conspiratorial conduct granted to the industry either by the Natural Gas Act or the Federal Trade Commission Act. The general requirement of the Federal Power Commission to weigh antitrust considerations in its rate determinations is not sufficient to displace the specific grant of authority in the Federal Trade Commission to determine antitrust violations and does not evidence a regulatory scheme inconsistent with the objectives of this investigation. The assertions to the contrary provide no basis for quashing the subpoenas.

Another jurisdictional argument is that the Commission has no jurisdiction to investigate or proceed against conduct which is per se economically impractical. The basis for this contention is the assertion that no oil company interested in continuing the sale of natural gas would deliberately underreport natural gas reserves because of its deleterious effect on the ability to compete, and on the ability to finance, not to mention the liability under the securities laws. The mere statement of the proposition demonstrates its absurdity.

One petitioner contends that on the basis of the Noerr-Pennington doctrine, collective efforts on the part of natural gas industry members to secure favorable decisions from the Federal Power Commission are immune from prosecution under the antitrust laws. Even assuming the correctness of the interpretation, immunity from prosecution under the antitrust laws cannot by virtue of *Noerr* be held to extend to collusive filing of false information with the Federal Power Commission. *Woods Exploration and Producing Company* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, —— U.S. —— (1972). *See also, Trucking Unlimited* v. *California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970), *aff'd*, —— U.S. —— (1972); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight,*

Inc., 365 U.S. 127 (1961). The Federal Power Commission itself lacks the authority to proceed under the antitrust laws against alleged collusive deception. *California* v. *Federal Power Commission, supra.* Therefore, *Noerr* cannot be interpreted to preclude the Commission from conducting the instant investigation to determine whether or not movant or other natural gas companies may be violating the antitrust laws and Section 5 of the Federal Trade Commission Act.

Several petitioners make the argument that the Commission should terminate, or alternatively, stay its nonpublic investigation of the reporting of natural gas reserves for Southern Louisiana. The grounds cited by movants relate to various audits of reserves purportedly performed by the Federal Power Commission. Questions regarding the collection of similar data by two agencies for different purposes relate to comity rather than to jurisdiction. They provide no basis for termination of the present investigation. This leaves only the question as to whether the Federal Power Commission has investigated and obtained evidence which the Federal Trade Commission staff can profitably use in its present investigation and can reasonably obtain. Movants cite three such instances: systematic investigations and periodic audits of gas reserve data by the Federal Power Commission; the Uncommitted Reserves Study; and the National Gas Survey.

The only systematic investigations and periodic audits undertaken by the Federal Power Commission that this Commission has been able to ascertain relate to applications filed with the Federal Power Commission for certification to construct pipelines. If certification is obtained, reserves dedicated to those pipelines must be reported annually on Federal Power Commission Form 15. This data, however, is not of much use in the present investigation. First, the figures relate only to reserves

which have been slated for shipment through the particular pipelines, (this does not include, for instance, the gas which will not be shipped in interstate commerce). Such figures are in no way equivalent to the proved reserves estimates of the producers themselves. Producers have been adamant in showing that the dedicated reserves differ from proved reserves and cannot be used to check the accuracy of the latter. Not only are they based upon shipment figures, state the producers, but they also may be based upon a different geological measurement system. As to producer data supplied to the Federal Power Commission, the only available figures are the final proved reserves estimates, which are channeled through the American Gas Association, and which we have also. The producers do not provide any underlying data upon which the estimates are made, so that the Federal Power Commission has no underlying data available with which we could check the accuracy of the reporting.

It is also contended that the information gathered in preparing the South Louisiana rate proceedings, AR69-1, and in the subsequent Uncommitted Reserves Study, track the data that we seek and that the Federal Power Commission determined at that time that the reserve estimates were "reasonably reliable for the purposes used." It is urged that we defer to the Federal Power Commission expertise in this area. But first, the Federal Power Commission reserves study was by no means complete, having been reduced from the originally planned audit of all reserves to an audit only of uncommitted reserves. Secondly, the underlying data which were to be available to the Federal Power Commission were kept at the offices of the producers, and are unavailable to us. Third, the questionnaires were never made public and were returned to the producers. No data was removed from the offices of producers and the workpapers of the auditing were destroyed. There would appear, therefore, to be no material upon which comity might work.

In addition, the Federal Power Commission had no procedure nor did it perform any kind of audit to determine whether the producers reporting reserves had reported all of their uncommitted reserves, nor was an investigation made to determine if all companies holding reserves in off-shore South Louisiana had filed questionnaires.

The Federal Power Commission Uncommitted Reserves Study did not set out to check the accuracy of American Gas Association proved reserve figures, but only the accuracy of certain producer figures compiled for one occasion. It is clear that the Federal Trade Commission cannot rely upon the accuracy of the final determination involved here, and it is equally clear that the underlying data are not available for Federal Trade Commission examination from the Federal Power Commission.

Finally, the argument is made that the Federal Power Commission is presently conducting a Natural Gas Survey for the specific purpose of auditing gas reserves, and that this Commission should stay its investigation pending completion of that study, in order to use the results gained from that study. But first, this Commission's investigation was begun substantially before that of the Federal Power Commission. Second, the Federal Power Commission study will not be adequate for our purposes. The study will be done on a random sampling basis; data will be evaluated only in company offices; the independent reserve team-generated worksheets will be preserved in the companies' offices until July 1, 1974. And there will be no cross-referencing of data from one company to another, as all reserve estimates on individual fields will be available only to the independent accountant working with the data on an individual firm. The study will cover only one year, 1970, and will miss the crucial years in our investigation, 1968 and 1969. Finally, selection of the fields for study has not been done or even

scheduled to be done, so it will be impossible to determine the extent of overlap for some time. Under the circumstances, we think it unnecessary to postpone our investigation in anticipation of the Federal Power Commission's study.

The Demands of the Subpoena are Unduly Broad, Vague, Burdensome and Irrelevant

a. Petitioners contend in various ways that the scope of the specifications is too broad. Some specifically exempt certain specifications from the charge (particularly A-D), but most condemn all the demands with such sweeping objections as that the subpoena "would call for every piece of paper conceivably related to the production and exploration of natural gas," that it is "nearly as broad as the Federal Trade Commission's vast potential Section 5 jurisdiction," and that it is "intended to cover every conceivable kind of document or record on paper, card, film or magnetic tape," or "sweeps across the entire range of [movant's] natural gas operations."

The petitioners, however, read the subpoena too broadly, for it displays no undue breadth of demand. The subpoena seeks specific information relating to the reporting practices of a portion of petitioners' total operations in a specifically defined geographic area through the use of terms clearly defined throughout the industry and clearly relevant to the investigation at hand.

One petitioner argues that a time period of, in some instances, a decade over which documents are demanded is too broad and burdensome.

It is clear that in an antitrust investigation such as the present one a time span of ten years is not at all unusual. Such a period of time is needed for the proper development and analysis of the pattern of behavior and of any change during that period.

It is also contended that no time frame is given for Specifications E and H. However, Specification E is worded in the present tense and demands information as to present customers and distribution methods, and H is clearly based upon Specification G and the time periods therein.

b. Several movants claim that certain of the specifications are overly vague. Arguments are made, for instance, that Specifications G, I, J and K are so vague and indefinite as to render the subpoena unenforceable because documents are demanded which "relate" to named items. Thus, these specifications call for a judgment decision by the movants "as to what is too remote." While subpoena demands must, of course, be reasonably clear, the specificity of the demands must be balanced against the agency's knowledge of what documents exist and in what form. It is clear that at the investigational stage the Commission lacks specific knowledge of the existence of particular documents.

In any case, the documents called for relate to specific categories of information. Each category pertains to a clearly defined factual situation relevant to the Commission's inquiry. That is all an investigatory subpoena need provide.

Other movants challenge Specification K(2)'s demand for production of documents relating to "lower proved reserves," because it provides no comparative basis. It is clear from the entire specification that documents are sought which reflect differences between the figures submitted to the American Gas Association and the possibly higher ones in these movants' own files which are used for other purposes.

Questions are also raised as to what "unit" means. That term refers to the standard measurement of reserves as reported to the American Gas Association,

Federal Power Commission and others. The most usual industry measurements are MCF, BCF and TCF (millions, billions, and trillions of cubic feet), as measured at sixty degrees fahrenheit and 14.73 psi (pounds per square inch). Any of these measurements, consistently used, is satisfactory.

c. Movants urge burden of compliance in several respects. Most movants argue that the large volume of documents, as well as their geographic dispersal, constitute the unreasonable burdensomeness of the demand. However, it is well settled that a subpoena will be enforced if on its face it is reasonably relevant to the investigation. *Federal Trade Commission* v. *Menzies*, 145 F. Supp. 164, 170 (D.C. Md. 1956), *aff'd*, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957); *Fleming* v. *Fidelity-Philadelphia Trust Company*, 248 F. Supp. 487, 493 (E.D. Pa. 1965). The general relevance of the demands is evident, and relevance of the technical data demand will be established *infra*. The search that may be necessitated by the subpoena does not result, therefore, from any impropriety in the demands made, but rather from the application of reasonable demands to a large and widespread corporation. The breadth of the search is found in movants' operations, not in the demands of the subpoena. The inconvenience that movants may suffer from having the subpoenaed data widely dispersed throughout its corporate division must yield to the public interest. *Wirtz* v. *Local 875, International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America*, 216 F. Supp. 798, 800 (E.D.N.Y. 1963). As Judge Weinfeld succinctly stated in *Application of Radio Corporation of America*:

> "But the great number of documents called for are an inevitable concomitant of RAC's gigantic size, the broad scope of its far-flung operations and the nature of its corporate structure. The magnitude of

> RCA's activities and the fact that some of its activities have been decentralized, with the consequent dispersal of records in various places, hardly serves as an excuse for denying the Grand Jury the right to inspect documents required by it in the furtherance of its duty.
>
> "*Inconvenience is relative to size.* Any witness who is subpoenaed suffers inconvenience. An individual operating a small business, for example, or a corporation operated by a sole shareholder, may suffer, in like circumstances more inconvenience than the movant with its thousands of employees. But this inconvenience, whether suffered by a witness, grand jurors, or jurors is part of the price we pay to secure the effective administration of justice and the enforcement of our laws." (Emphasis added.) *Application of Radio Corporation of America*, 13 F.R.D. 167, 171-172 (S.D.N.Y. 1952); *see also, Oklahoma Press Publishing Company* v. *Walling*, 321 U.S. 186 (1946).

A number of petitioners contend that the thirty-day time period given for response to the subpoena is unreasonable. The reasonableness of the time allowed for compliance with the subpoena is best left for resolution between petitioners and Commission staff pursuant to Section 2.7 of the Commission's Rules of Practice.

d. Several petitioners contend that the subpoena is unreasonable in that it requires production of technical and nonproduction data related to the companies' estimates of natural gas reserves which are beyond the competence of the Commission to interpret, and are irrelevant to any investigation of possible violations of the antitrust laws. Technical data underlying the companies' reported estimates of natural gas reserves are clearly relevant. As discussed *infra* p. 21, the purpose of the investigation is to determine whether the companies, in-

dividually or collectively, are engaged in activities which violate Section 5 of the Federal Trade Commission Act in the context of the activities defined by the resolution. Underlying data are essential to enable the Commission to determine the accuracy of such estimates and the soundness of the companies' reporting procedures and to assist the Commission in evaluating the companies' conduct in connection with the exploration, development, production and marketing of natural gas. Even assuming that the data is "highly technical," as is claimed, this does not preclude the Commission from conducting its investigation. It represents a curious situation at best for an investigated party to assert, as barring investigation, the complexity of the matters investigated. The ability of an agency to evaluate information sought has been and continues to be necessarily a factor totally irrelevant to the legitimacy of investigational demands.

One petitioner objects to the relevance of the subpoena specifications calling for information relating to the sale and net production of natural gas, and to the reporting and estimating activities that precede exploration, development, purchase or sale of explorable acreage. The former category of information is relevant to the investigation at hand because of the necessity and desire to determine whether public interest exists from the magnitude of the sale of natural gas. The latter category of information regarding other, less direct methods of estimating gas reserves is relevant from a comparative standpoint because of the potential correlation in this type of gas reserve estimation and ultimate gas reserve reporting.

The Commission Failed to Comply with the Requirements of the Federal Reports Act of 1942

Movants contend that identical subpoenas were issued to more than ten companies asking for identical information, and that the demand must, therefore, be submitted to the Office of Management and Budget according to the provisions of the Federal Reports Act (44 U.S.C. §§ 3501, *et seq.*).

Section 5 of the Act (44 U.S.C. § 3509) provides:

> "A Federal agency may not conduct or sponsor the collection of information upon identical items, from ten or more persons, other than Federal employees, unless, in advance of adoption or revision of any plans or forms used in the collection—
>
> "(1) the agency has submitted to the Director the plan or forms, together with copies of pertinent regulations and of other related materials as the Director of the Bureau of the Budget has specified, and
>
> "(2) the Director has stated that he does not disapprove the proposed collection of information."

The Commission believes that this section of the United States Code is not applicable to the issuance of administrative subpoenas for law enforcement purposes, and that clearance from the Director of the Bureau of the Budget (now Office of Management and Budget) need not be sought.

A threshold determination in ascertaining the applicability of the Federal Reports Act involves a determination whether issuance of this administrative subpoena constitutes a "collection of information" within the meaning of Section 5 of the Act. The term "information" has been given a word-of-art definition for purposes of the Act. Section 3502 of Title 44 defines the term as follows:

> "As used in this chapter —
>
> * * * *

> " '[I]nformation' means facts obtained or solicited by the *use of written report forms, application forms, schedules, questionnaires, or other similar methods* calling either for answers to identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States or for answers to questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest." (Emphasis supplied.)

Obviously, the mere existence of the above-quoted definition substantiates congressional intent to limit the definition of the common word "information." The construction of the definition most applicable and favorable to petitioner's argument that subpoenas are covered reads as follows:

> " '[I]nformation' means facts obtained or solicited by . . . [various forms and questionnaires] . . . calling . . . for *answers to identical questions* . . . ." (Emphasis supplied.)

The subpoena, like all Commission subpoenas, does not ask questions. It is not a written report form, questionnaire, application form, schedule or other document calling for the formulation of an answer. Compliance with a subpoena and a return thereunder does not require the formulation or expostulation of an answer.

All that an administrative subpoena requests are *documents*. It is well-settled law that a subpoena may not compel a party to prepare any documents or other information for the purpose of the subpoena. In short, the documents sought by a subpoena must exist prior to the date of return under the subpoena, and need not be prepared in response thereto. Thus, a return of documents under a subpoena is not the obtaining of "facts obtained or solicited by use of written report forms * * *

for answers to identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States . . . ."

There is another reason why the Commission is not required to seek Bureau of the Budget (now Office of Management and Budget) clearance for the issuance of the subpoena in question. The Federal Reports Act is limited by its literal terms to the collection by federal agencies of information in the nature of the reports intended "to be used for statistical compilations of general public interest." (44 U.S.C. § 3509.) Hence, it does not govern the investigatory activities of the Federal Trade Commission seeking by compulsory process to determine whether any of the laws it administers have been violated.

The validity of this contention is demonstrated by the definitional concern toward limiting the term "information." The final clause of that definition modifies the term "facts" as applied to the meaning of "information." Thus, the appropriate phraseology of the definition of "information" (with omission for clarity) is:

> " '[I]nformation' means facts . . . [obtained by various methods] . . . *which are to be used for statistical compilations of general public interest.*" (Emphasis supplied.)

Although the precise meaning of this definitional phrase is not reflected in the legislative history of the Act, other sections of the Federal Reports Act verify that the Act was not intended to encompass the use of compulsory process by independent regulatory agencies. Section 3506 (44 U.S.C. § 3506) provides that any party having a substantial interest may request that the Director of the Bureau of the Budget (now Director, Office of Management and Budget) determine ". . . whether or not the collection of information by a Federal

agency is necessary for the proper performance of the functions of the agency or for any other proper purpose." The appropriateness of this section in instances not involving alleged violations of law is manifest. It enables a business to obtain relief from an otherwise burdensome information collection process. However, the rights afforded under this section, when applied to alleged violations of law, produce an absurd and inconsistent result.

Application of Section 3506 to law enforcement efforts of independent regulatory agencies would provide a corporation or business entity the opportunity for frustration of the statutory purpose found, for example, in the Federal Trade Commission Act. That section vests in the Director of the Bureau of the Budget (now Office of Management and Budget) the authority to determine the necessity for the collection of information. If found unnecessary, the Act bars the agency so found from further collection of this information.

Thus, if we accept petitioner's construction of the Federal Reports Act, it would mean that the very person who is being investigated for possible law violations may appeal to, and obtain a hearing by, the Bureau of the Budget (now Office of Management and Budget) on the nature of the compulsory process used, before the federal agency concerned may obtain by its compulsory process investigatory facts needed to determine whether the laws it enforces have been violated. Congress surely never intended to subject to executive review the use of compulsory process in investigations to determine law violations. However, if we accept petitioner's argument, in effect the now Office of Management and Budget has plenary, unappealable power to determine whether compulsory process "is necessary" for proper effectuation of the Commission law enforcement, investigatory functions.

We believe the point made above goes to the very heart of the determination of the applicability of the Federal Reports Act, and requires re-emphasis: If Congress had sought such anomalous results by passage of the Federal Reports Act, the intention would have been clearly manifest somewhere in the legislative process.

No such intent appears either in the statutes or in its legislative history. 82 Stat. 1302, 5 U.S.C. § 3501; *see* Conference Report on this bill, reproduced at 88 Cong. Rec. 9434-9435 (December 10, 1942); *see also* Senate Report No. 1651, 77th Cong., 2d Sess. (1942). Virtually every relevant legislative interpretation either expressly or implicitly indicates that the information sought for proscription under this Act does not include that which is a necessary adjunct to the discharge of law enforcement responsibilities and which bears directly on an ascertainment of alleged law violations. Accordingly, we do not accept petitioner's argument that the Federal Reports Act applies to compulsory process issued by the Federal Trade Commission for law enforcement purposes.

The Documents are Confidential, and the Subpoena and the Commission's Procedures do not Adequately Protect them from Disclosure

Movants contend that much of the information demanded consists of highly confidential trade secrets such as bidding procedures and estimates of natural gas in the fields.

The alleged confidential nature of documents, however, does not preclude their inspection and examination by the Commission and provides no basis for limiting or quashing a subpoena. *Federal Trade Commission* v. *Tuttle*, 244 F.2d 605 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1957); *Federal Trade Commission* v. *Green*, 252 F. Supp. 153 (S.D.N.Y. 1966). Documents received

during a nonpublic investigation such as this are not a matter of public record, but instead constitute part of the confidential records of the Commission, pursuant to Section 4.10 of the Commission's Rules. Under Section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who makes public any information without authority of the Commission or by direction of court is guilty of a misdemeanor and subject to criminal sanctions.

The confidential nature of the documents thus provides no basis for quashing the subpoena.

One movant goes to extremes and contends that disclosure of information to the Commission is tantamount to disclosure to competitors, and that this would reduce competition in violation of the antitrust laws. The argument is patently ridiculous. Such an unfounded assumption of disclosure of information received would, if taken seriously, bring into question all Commission proceedings.

The Resolution Fails to Advise the Scope and Purpose of the Investigation

It is next contended that the resolution of June 3, 1971, is vague and ambiguous, encompassing almost any violation of the very broad sweep of Section 5 of the Federal Trade Commission Act. In support of the argument, movants refer to the several cases in which courts have felt compelled to quash compulsory process issued pursuant to an unlawfully vague resolution. The principal ones cited are *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961); *Hellenic Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 138 (D.C. Cir. 1961). In those cases, however, there was either no statement of purpose or merely a statement that the investigation was being carried on pursuant to certain general statutory authority.

The scope of the present investigation is clearly marked out by the terms of the resolution which specify the identity of the companies under investigation, the specific products involved, and the particular acts and practices of the companies to be investigated. The purpose of the investigation, as indicated in the resolution, is to determine whether the companies, individually or collectively, are engaged in activities violative of Section 5 of the Federal Trade Commission Act in the context of the activities defined by the resolution. The argument is also made that the resolution does not authorize investigation into areas outside South Louisiana because it specifically mentions reserve reporting for that area. However, the resolution expressly covers conduct or activities relating to the exploration or development of natural gas without any limitation as to geographical area. The very object of gas exploration is to uncover gas reserves, which then become company assets to be used in various ways, including being reported to the American Gas Association. The reporting of gas reserves is thus directly related to exploration and development and, as such, is authorized by the resolution. Moreover, the terms of the subpoena make it abundantly clear as to precisely what acts and practices of the petitioner are under investigation. *See also, Federal Trade Commission* v. *Green, supra.*

Delegation to an Assistant Bureau Director of Authority to Issue Subpoenas is Unlawful

Movants contend that the Commission is without power to delegate the authority to issue subpoenas. It is clear that Reorganization Plan No. 4 of 1961, 26 Fed. Reg. 6191 (1961), 72 Stat. 837, 5 U.S.C.A. § 1, provides the Commission with authority to delegate its functions to employees. Pursuant to such authority, the Commission, on April 8, 1970, 35 Fed. Reg. 5753, amended 35 Fed. Reg. 10627, by general delegation, and by Section 2.7(a)

of the Rules of Practice and Procedure, 35 Fed. Reg. 5681, expressly delegated the authority to issue subpoenas to assistant bureau directors.

The validity of such a delegation has recently been upheld by the 5th Circuit Court of Appeals. *Federal Trade Commission* v. *Gibson*, 1972 Trade Cas. Par. 73,985 (5th Cir. May 19, 1972). In its decision, the court squarely faced and flatly rejected contentions identical in all material respects to those raised by Movants in this investigation. It determined with regard to a parallel delegation to field office officials that "[T]he authority to issue investigative subpoenas duces tecum was properly and unequivocally delegated. . . ." In reaching this conclusion, the court specifically found that the Commission's power to make such a delegation is derived from Reorganization Plan No. 4 of 1961. It is clear the Commission may properly delegate the authority to issue subpoenas, and Movants' arguments to the contrary are patently without merit.

One Movant asserts that the Commission's efforts to delegate its subpoena powers have thus permitted and resulted in an oppressive and unreasonable attempt by the staff to oppress business. This argument likewise is without merit. The retention by the Commission of the ability to review motions to quash evidences the fact that Movant's arguments as to uncontrolled abuse are groundless.

The Commission's Rules of Practice Deny Witnesses the Right to Adequate Representation by Counsel, as Guaranteed by the Constitution and the Administrative Procedure Act

Petitioners contend that Rule 2.9 purports to limit the right of representation by counsel in substantive ways and that this contravenes both the Administrative Procedure Act and the Constitution. It is unquestionable that

the Administrative Procedure Act, 5 U.S.C. § 555, applies and a witness responding to a Commission subpoena is entitled to be accompanied, represented, and advised by counsel. The Commission's rule so provides, and the cases cited by counsel to the contrary are irrelevant because they deal with investigational hearing procedures employed prior to the adoption of present Rule 2.9.*

Petitioners contend that Rule 2.9 denies counsel "any right to challenge the Commission's authority to conduct the investigation or to challenge the legality or sufficiency of the subpoena" before the presiding official and is therefore in direct conflict with *Anheuser-Busch Inc.* v. *Federal Trade Commission*, 359 F.2d 487 (1966). Rule 2.9(b)(4), however, does not deprive counsel of the right to make such a challenge before the presiding official; it merely establishes the procedure in accordance with which objections must be made. Motions challenging either the Commission's authority to conduct an investigation or the legality or sufficiency of the subpoena must be directed first to the Commission in accordance with Rule 2.7. In the event the motion is denied and counsel wishes to continue the challenge, he may file a copy of the motion with the presiding official as part of the record of the investigation, and he may refuse to produce the documents demanded on the grounds stated in the motion.

Clearly then, a challenge to the subpoena may be made before the presiding official without reargument of any ground relied upon in the motion addressed to the Commission. In *Anheuser-Busch* the court stated:

> "[t]he hearing officer has no statutory power to enforce compliance or to impose sanctions. Instead,

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* *Wanderer* v. *Kaplan*, 1962 Tr. Cas. Par. 70,535 (D.D.C. 1962); *Hall* v. *Lemke*, 1962 Tr. Cas. Par. 70,338 (N.D. Ill. 1962).

to enforce the summons, the Commission must seek the assistance of a court.

"It is this resort to the federal court which, . . . is the 'adversary proceeding affording a judicial determination to the challenges to the summons and giving complete protection to the witness.' "

It is clear that Rule 2.9(b)(4) is not in conflict with this decision, and movants' reasoning to the contrary is not supportable.

Moreover, the present rule constitutes full representation in accordance with Administrative Procedure Act standards. It provides that movant may be "accompanied, represented, and advised" by counsel at the investigational hearing when return is made under the subpoena. At the hearing, counsel may consult with his client either on his own initiative or at the request of his client. If the witness refuses to answer any questions on advice of counsel or on his own initiative, counsel may briefly state the legal grounds for the refusal. Further, if it is claimed that any testimony is outside the scope of the investigation or the witness is privileged to refuse to answer, counsel may state briefly the grounds of such claims. Following completion of the questioning of any witness, counsel may request the presiding official at the investigational hearing to permit the clarification of any answer given in order that it "may not be left equivocal or incomplete on the record." This procedure permits counsel to state on the record reasons why the witness' testimony is equivocal or incomplete and why clarification may be necessary to understand the meaning of an answer given in response to a particular question. The fact that a presiding official may deny the request does not in any way deprive the witness of his right to effective representation by counsel.

Finally, as to one petitioner's argument that refusal to answer questions may result in the imposition of

criminal sanctions, such action may be taken only through a court proceeding wherein the respondent may raise his objections anew.

Although Rule 2.9 does not permit counsel to testify on behalf of his client, it does provide for full representation by counsel in compliance with the requirements of the Administrative Procedure Act. Accordingly, the arguments raised as alleged deficiencies in the rule provide no basis on which to quash these subpoenas.

The Subpoena Requires Production of Documents from the Files of Movants' Subsidiaries and Affiliates

Some petitioners further object to the subpoena on the ground that it requires them to produce documents within the custody and possession of independently operated subsidiary corporations which they own or control. They argue that such documents are not within their control and are, therefore, beyond the reach of the subpoena.

In *In re Investigation of World Arrangements*, 13 F.R.D. 280 (1952), the court considered and rejected an argument substantially similar to that which movant urges upon the Commission. The court stated:

"The position of the movants is that they cannot reach the files of their own subsidiaries unless they are available 'free of the necessity of securing the consent of others.' It is inescapable that the 'others' can only mean the corporations' own subsidiaries. A corporation, be it the parent corporation or the subsidiary corporation, functions under the guidance of its directors. Therefore, if a corporation has the power, either directly or indirectly through another corporation or a *series* of corporations to elect a majority of the directors of another corporation, such corporation may be deemed a parent corpora-

> tion and in control of the corporation whose directors it has the power to elect to office. If any corporation herein under the subpoena duces tecum has that power it has the control necessary to secure the documents demanded by the government."

When a parent company is served with a subpoena, it is no defense to claim that the information is within the possession of a wholly owned subsidiary, because such a corporation is owned and controlled by the parent. *See generally, Westinghouse Credit Corp.* v. *Mountain States Mining and Milling Co.*, 37 F.R.D. 348, 349 (1965).

No petitioner making these assertions contends that it lacks the power, either directly or indirectly, to choose a majority of the directors of its subsidiary corporations, *see generally, Flank Oil Co.* v. *Continental Oil Co.*, 277 F. Supp. 357 (1967); and if such power exists, the petitioners have the control necessary to secure the documents demanded by the Commission's subpoena.

Requests to be Provided with Copy of Staff Memoranda Supporting Subpoena to Reply Thereto and to Present Oral Argument; Requests for Extension of Time and Substitution of Parties

Many petitioners request permission to obtain a copy of and to reply to any memoranda, comments or recommendations of the Commission's staff in support of the subpoena, and an opportunity to present oral argument. However, since this matter is not at an adjudicatory stage, it does not involve the same due process considerations that otherwise apply. In the case of *Federal Trade Commission* v. *Hallmark, Inc.*, 265 F.2d 433 (7th Cir. 1959), the court discussed the point well:

> "'Adjudication' is defined by 5 U.S.C.A. § 1001 (d) as meaning 'agency process for the formulation

> of an order.' The same section defined 'order' as meaning 'the whole or any part of the final disposition . . . of any agency in any matter other than rule making but including licensing.' The present investigation does not qualify as an adjudicative adversary process . . . . The investigation may eventually lead to an adjudicatory proceeding, but the investigation itself will result in no final disposition of the rights and duties of Hallmark." (*Id.* at 437.) *See also, Federal Trade Commission* v. *Waltham Watch Company*, 169 F. Supp. 614 (D. S.D.N.Y. 1959); *Federal Trade Commission* v. *Scientific Living*, 150 F. Supp. 495 (D. M.D. Pa. 1957).

The Commission is under no obligation to grant movants access to the "staff memoranda" in support of the subpoenas, nor does the Commission generally grant access to such documents. Staff communications to the Commission regarding a motion to quash an investigational subpoena constitute intra-agency memoranda and are thus exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552(b)). As the Fifth Circuit has held:

> ". . . intra-agency correspondence discussing the course of conduct to be followed by the parties and expressing opinions as to the merits of various claims presented to the agency enjoys at least a qualified privilege which, in the absence of special circumstances, shields it from examination by the public." *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 604-605 (5th Cir. 1966).

There are no special circumstances in this case. Staff communications regarding the recommended course of actions with respect to movants' motions do not in any way diminish movants' right to present their case. Movants' requests that they be permitted to respond to staff

communications would result in needless delay, and accordingly, are denied.

Finally, several movants request leave to present oral argument on their motions. In view of the fact that the issues as set out in the motions and supporting memoranda appear comprehensive, oral argument would result in needless expense and delay. The requests, therefore, are denied. *Federal Trade Commission* v. *Hallmark, Inc., supra.*

The motions to quash the subpoenas are without merit, and, accordingly, are denied. Appropriate orders accompany this opinion. Any extension of time for response to the subpoena duces tecum may be negotiated with the staff attorneys, pursuant to Section 2.7 of the Commission's Rules. The same procedure will apply to requests for substitution of persons required to appear and testify in this investigation.

June 27, 1972

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION

File No. 711 0042

Nature and Scope of Investigation: The purpose of the authorized investigation is to develop facts relating to the acts or practices of the following corporations, Continental Oil Company, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Standard Oil Company, California, Humble Oil & Refining Company, The Superior Oil Company, Inc., Texaco, Inc., and Union Oil Company of California, to determine whether said corporations, and other persons and corporations, individually or in concert, are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, and 10 of the Federal Trade Commission Act, 15 U.S.C. 46, 49, 50; FTC Procedures and Rules of Practice 16 C.F.R. 1.1, et seq. and supplements thereto.

By direction of the Commission.

/s/ Chas. O. Tobin
Secretary

[SEAL]

Dated: June 3, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1096-73

FEDERAL TRADE COMMISSION,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

AFFIDAVIT

THE STATE OF TEXAS)
COUNTY OF HARRIS)

H. R. HIRSCH, being duly sworn, deposes and says:

1. I was graduated in 1956 from the University of Texas at El Paso with a Bachelor of Science Degree in physics and geology. I have been employed by Mobil Oil Corporation since graduation. My assignments have included approximately 14 years in various exploration positions dealing with Mobil's offshore activities. At the present time, I am Exploration Manager of Mobil's Southern Exploration and Producing Region. In this capacity, I have direct responsibility for exploration programs in all or parts of 26 states and adjoining offshore areas in the Gulf of Mexico and along the Atlantic Coast.

Initial Accumulation of Geological and Geophysical Data

2. The search for oil and gas begins with the acquisition of geological and geophysical data. In a broad context, the science of geology is the study of the history of the earth as recorded in rocks. In the same broad

context, geological data includes all data relating to the rock history of the earth. In offshore Louisiana, geological data is primarily comprised of rock data obtained from wells drilled into the earth. The data includes various types of measurements of rock properties called logs and direct visual examinations. Data is obtained from wells drilled by Mobil and from wells drilled by other companies and acquired by Mobil through purchase or trade. The amount of well data available from trades or purchase is limited by competitive considerations.

The science of geophysics in a broad context is the study of the physics of the earth. Geophysical data includes all measurements of the physical properties of the earth. The most commonly used geophysical data in petroleum exploration involve direct measurements of changes in the earth's gravity and magnetic fields that could be associated with changes in the physical properties of the rocks below the surface; and seismic measurements of the passage of artificially induced sound waves through the subsurface rocks. Seismic techniques offer the most valuable and descriptive geophysical data and are therefore the most important.

The majority of Mobil's geophysical data is acquired by company-owned-and-operated crews and independent contractors engaged in full time exploratory work but employed exclusively for Mobil's account on particular projects. This proprietary data is acquired solely for Mobil's use. It is supplemented from time to time through cost sharing agreements with other companies for obtaining raw data or is purchased on the open market from specialized companies offering such data for sale. In either event, the data obtained is subject to severe strictures on confidentiality. The following schedule shows Mobil's planned 1973 expenditures for the various categories of data.

GEOPHYSICAL DATA-GATHERING EXPENSE IN GULF OF MEXICO DURING 1973

%	Mobil Proprietary	M$
57	Company Crew	5,250
22	Contract Crew	2,025
19	Spec. Data Purchases	1,750
2	Cost Sharing	175
100		9,200

Mobil also engaged in some geochemical analyses. These analyses involve a study of the chemical properties of rocks to locate favorable habitats for oil and gas.

3. The goal of the geologists and geophysicists is to construct from the various types of raw data a hypothetical picture of the structural configuration and rock texture thousands of feet below the surface. As a subsurface picture begins to take shape, it may show, for example, that a dome-like structure exists at 5,000 feet. If Mobil geologists and geophysicists have found hydrocarbons on similar dome structures in the same general geographical area in the past, there is some possibility but not a certainty that petroleum hydrocarbons may be present. There is also the possibility that the interpretation of the raw data is incorrect or that the interpretation is correct but that the dome does not contain hydrocarbons. This example is, of course, immensely simplified. The development of this subsurface picture is a complex undertaking requiring trained personnel and an enormous investment in the raw data from which it is constructed. The techniques applied to the raw data are constantly under revision as a result of research and development and are very confidential.

4. The acquisition and interpretation of geological, geophysical, and geochemical data is a continuing pro-

gram in Offshore Louisiana and other areas of interest to Mobil.

Mobil spends millions of dollars a year acquiring and interpreting the data and would suffer severe competitive injury if portions of the data were obtained by a competitor. The competitor might have no data or inadequate data on a given tract and would thus be spared the expense of developing his own. Even if the competitor had his own data, he would be at a significant advantage in bidding if he had Mobil's data to combine with his own.

The raw data and subsequent interpretations form the basis for Mobil's nomination for offshore tracts to be posted for sale and the amount of money to be bid on tracts offered at various sales. Strict confidentiality of the information is therefore essential from a competitive standpoint.

A competitor's chances of outbidding Mobil by an unfairly calculated narrow margin would be substantially improved if he had access to Mobil's raw data and subsequent interpretation. The United States would also be in a loss position if violation of the confidentiality lessened competition and certain companies were able to obtain tracts without bidding their maximum value assessment.

The necessity for confidentiality and value of the data is confirmed by the amount of litigation that occurs to prevent attempts to sell confidential data. Mobil entered into an agreed judgment with former employees to prevent them from utilizing confidential Mobil exploration techniques. See *Mobil Oil Corporation* v. *Petroleum Exploration Consultants Worldwide, Inc.*, Civ. Act. No. CA-3-7107-D (USDC N.D. Tex. June 5, 1973).

5. On the basis of geological and geophysical data and expert interpretation of that data, Mobil compiles

estimates of the petroleum hydrocarbon reserves it believes could be present in a given area or on a given tract. These are called "speculative" reserve estimates. Although the term "reserve" is used, this is a misnomer because no hydrocarbons have yet been found. In addition to the fact that test wells have not been drilled to determine if gas or oil reserves actually exists, Mobil does not even own the property on which the estimates have been made. While heavy reliance is placed on scientific data and techniques, there is a considerable element of uncertainty in the work of reservoir engineers, geologists and geophysicists. These experts may know, for instance, that a structure similar to the one believed to exist below the surface produced 10,000 units of gas in a nearby area. The structure is thus assigned a speculative estimate figure of 10,000 reserve units. This example is, of course, immensely simplified. Often, several speculative estimates are made for each tract to reflect the range of uncertainty for each parameter. When the "speculative" figure or figures are developed, no one knows (1) if hydrocarbons are present at all on the site, (2) if they are present, whether the reservoir contains oil or gas and whether they exist in producible quantities, (3) the depth of the reservoir, (4) the reservoir's thickness and areal extent, (5) the porosity of the reservoir, etc. None of these factors can be determined with any degree of certainty prior to drilling.

The geological and geophysical data and speculative estimates provide the basis for further decisions on whether to nominate a tract for sale, whether to bid on it, and how much to bid. They serve no purpose after the bid is submitted except to compare results to predictions which might improve Mobil's assessment of bids in future sales.

Nominations of Tracts for Inclusion in Lease Sales

6. Periodically the producing companies are called upon by the Bureau of Land Management of the Department of Interior to nominate tracts of federal land to be offered for lease for the purpose of exploration and hopefully production of hydrocarbons. Tracts are nominated by Mobil on the basis of preliminary geological and geophysical work. The Bureau of Land Management then decides which of those tracts nominated by various interested bidders are to be offered for lease. In selecting tracts to be offered for sale, the Department of the Interior has available through the United States Geological Survey, raw geological and geophysical data and interpretations. In fact, Interior has all of the geological data and interpretations obtained from all of the wells drilled on Federal leases and is therefore in a better position to evaluate specific tracts than any one company that only has available its own well data plus that acquired through trade or purchase. A public announcement of the tracts to be posted for lease is made some six months or so in advance in the Federal Register. This is to allow interested parties sufficient time to thoroughly evaluate all tracts posted for sale.

Preparation of Mobil Bid

7. The final bid figure if any is a decision made by top executive management. Bid recommendations for their consideration are derived through a highly complex process which is often referred to as bid methodology. The methods of interpretation applied to the raw data to obtain "speculative" or prebid reserve estimates and the "bid methodology" applied to these estimates to arrive at a bid figure differ from company to company and are the most closely guarded trade secret in the oil business—perhaps in all of American business.

8. In Mobil, only a handful of executives are privy to the precise bids at the time they are filed. This extreme confidentiality is necessary because bidding for offshore leases is intensely competitive. Offshore Louisiana is an important gas producing province. Failure to acquire new petroleum reserves at prices that will yield an acceptable profit has serious long-term economic and competitive consequences.

9. Mobil's bid methodology is highly complex, involving computers, mathematical formulas and scores of economic variables. The initial input data are the "speculative" reserve estimates which, as described above, have a very low degree of accuracy but represent the best figures available with existing technology. In arriving at a bid figure, it is necessary to apply a risk factor to the speculative reserve estimates in recognition of the fact that many of the wells drilled will be dry. For example, the speculative reserve estimates on a given tract to be bid might be 1,000 units of hydrocarbons. Mobil's explorationists know, however, from experience that no matter how favorable the subsurface structures appear to be, at least half (this is a hypothetical figure) of the wells drilled will be dry holes. Obviously, to ignore this experience factor would be irrational and could have severe economic consequences. Thus, in this example, Mobil applies a risk factor of 50% to the hypothetical speculative reserve estimate and bids on the basis of 500 units of hydrocarbons rather than 1,000. The expected or probable reserve then becomes 500 units rather than the highly speculative 1,000 units.

10. Another step in bid preparation is to apply numerous economic data to the risk-adjusted speculative reserve estimates. For instance, what is the probable cost of producing the gas, what is the likely selling price, at what daily rate can the gas be produced, and what will be the life of the field? These are only four basic

considerations among many. Even cost and price factors, which in some businesses would not be difficult to forecast, are extremely complicated in the oil and gas business because they must be figured over the life of a field that may be as much as 20 years or more. Calculating costs and prices 20 years in the future, which requires predictions of the effect of worldwide political and economic events on the energy market, requires a great deal of expertise and speculation. Mobil has attempted to make these calculations as precise as possible by including all available data into computer programs and highly complex mathematical formulas. These formulas and related techniques are the result of years of research and are highly confidential trade secrets.

11. The third step in arriving at a bid is assessing the competition. Mobil obviously wants to bid the minimum necessary to acquire desired tracts. Although it happens at times, no company wants to bid millions of dollars for a tract only to find out that it was the only bidder or that the second highest bid was in the thousands of dollars. Mobil constantly studies the bidding histories of its competitors and scores of other factors to try to predict how much will be bid on tracts of interest to Mobil. Although imprecise and uncertain, the goal of assessing competitors is to estimate what is the lowest figure Mobil can bid and still maintain some probability of winning.

12. An additional step in determining bid values is the assessment of broad company objective and capacities. For example, does Mobil need hydrocarbons downstream for its own refineries, what is its cash position, what are the capital markets like, and what are the benefits and liabilities of owning this tract tomorrow and in 20 years? The examples are endless.

13. This broad outline cannot begin to reveal the complexity of estimating speculative reserves and preparing

a bid for an offshore tract. Each step involves immense quantities of data, sophisticated mathematical calculations, complex economic considerations, and years of experience. The formulas and calculations involved comprise Mobil's "bid methodology." The "bid methodology" serves only one purpose—arriving at a bid figure. It has no function whatsoever in any phase of Mobil's business after preparation of the bids other than to determine the accuracy and effectiveness of the bid preparation process by comparison of the pre-sale predictions with post-sale results in terms of buying leases and finding proved reserves.

14. Mobil's "bid files" as the term has been used in this proceeding thus include: raw geological and geophysical data; maps and other documents used in interpreting this raw data for the purpose of arriving at "speculative" reserve estimates; the "speculative" estimates and attendent risk adjustments; and various documents revealing Mobil's "bid methodology." "Bid files" have nothing to do with the estimation of proved reserves. The information these files contain is used only for the purpose of bidding.

The Data Contained in the Bid Files is Irrelevant to this Investigation

15. As stated previously, speculative reserve estimates are based on interpretations of inexact data usually derived from non-direct measurements of rock properties; empirical observations, experience, and subjective judgments, and therefore have a low accuracy expectation. To be useful in the bid preparation process, the speculative estimates must be adjusted for risk. Although the risk-adjusted estimates represent a higher confidence level than the speculative reserves, considerable inaccuracies remain.

Neither the speculative estimates nor the risk-adjusted estimates have any relationship with or bearing on proved reserve estimates made on the basis of drilled well data. Although not included as part of these proceedings, the 1968 Texas Offshore Federal sale is a good example of the disparity between pre-sale speculative estimates and proved reserves. At that sale, Mobil spent $32 million for a leasehold interest in eight (8) tracts containing a net to Mobil speculative reserve estimate of 313 million barrels of oil and natural gas liquids and 2919 BCF of gas. After adjusting for risk, Mobil expected to find 104 million barrels of oil and other liquids and 806 BCF of gas for its own account. Mobil had less than a 50% interest in five tracts it acquired an interest in. A total of 18 wells were drilled without locating any commercially producible hydrocarbons and the leases were eventually relinquished. Although the sale tracts had large speculative reserve estimates and Mobil believed that they contained oil and gas as evidenced by the $32 million lease expenditures the proved reserves were then and are now, zero. Mobil's belief that the tracts are totally without any proved reserves is attested to by the fact that all ownership rights have been relinquished.

Discrepancies can also be shown for sales covered by the FTC allegations.

This example shows the irrelevance of Mobil's bid files to this investigation which is directed at proved reserve estimates reported by the AGA. First, the example shows that there is a clear division between pre-bidding and post-bidding activities. The bid files are used only up until the time of the bid and are of no further use except to provide guidance for improvement in future bidding methodology. All post-bidding activity is based on data obtained from actually drilling except that in some cases, additional geophysical data is obtained because the drilling results varied so dramatically from those predicted.

Secondly, as shown by the above example, the speculative reserve estimates which are based purely on raw geological and geophysical data are often grossly inaccurate. Thus to suggest that they should be compared to proved estimates to see if there has been under-reporting is absurd. Finally, Exhibit A* shows the data upon which various types of reserve estimates are based. The reserve estimates are derived from very different data bases. The speculative estimates are grounded entirely on raw geological and geophysical data while the post-drilling or "proved" estimates are based on well logs, producing rates, core samples, and other concrete data obtained by actually drilling. The geological and geophysical data used in arriving at "proved" reserve estimates is refined by subsequent drilling data and is therefore qualitatively different from that used for speculative reserves.

16. Mobil considers its bid files strictly confidential. It has spent millions of dollars developing the methodology by which it computes speculative reserve estimates from raw geological and geophysical data and computes a bid figure from the speculative reserve estimates. It considers these methodologies trade secrets. The documents reflecting this methodology and the speculative reserves estimates are kept in a bank safe deposit box or in Mobil's vault until sometime after the lease sale for which the bid file has been prepared. After the sale, security continues to be strict. Access within the company is severely limited. Speculative estimates usually are in handwriting to limit exposure to clerical personnel.

17. Producing companies that bid on offshore leases spend a great deal of time and money analyzing their competitors' bidding practices. Their purpose is to attempt to decipher their competitors' methodology and thus have some idea what they will bid in the future on a given tract. If any of the highly confidential data

sought by the Trade Commission fell into the hands of a competitor, it could be the very item it needed to pin down its analysis of Mobil's bid methodology therefore severely hampering Mobil as a competitor for offshore leases, and thus reducing competition in the natural gas industry. Speculative reserve estimates, even though no longer of utility, are kept in strictest security, however, because they can be used to reach inferential conclusions about Mobil's bid methodology. The amount bid by Mobil on a given tract is public information. The starting point for the bid figure is the speculative reserve estimate. If a competitor obtained the speculative reserve estimates on particular tracts, it could compute roughly how much Mobil bid per unit of speculative reserves. Also, a competitor could develop a correlation factor between its speculative reserves and Mobil's and thereby predict Mobil's speculative estimates at future sales. Although the formula and processes by which Mobil arrived at the dollar figure per unit could not be deciphered, the dollar figure per unit plotted over several lease sales would give a competitor a very close approximation of how much Mobil would bid on a given tract at future lease sales. Therefore, although the speculative reserve estimate on, for instance, the 1970 lease sale is of no further use to Mobil, it would be a highly prized treasure to a competitor.

Development of Reserve Figures Once A Lease Is Obtained

18. There is a clear dichotomy between pre-drilling and post-drilling activities and data. This is shown graphically by Exhibits B and C* which set out the various steps taken prior to bidding. As can be seen, these steps consist primarily of assembling and evaluating geological and geophysical data. Once a lease is purchased, the bid files are of no further use whatsoever. Drilling commences promptly and a whole new set of hard data

is obtained from the actual drilling. Exhibit D* shows the extensive post-bid activities. Once drilling has commenced and data such as well logs and core samples are obtained from the actual holes that have been drilled, geological and seismic data contained in the bid files is rapidly superseded. As illustrated by the Appendix to Mobil's brief,** well logs, and other relevant data are furnished to the USGS. Once parameters of the field are defined by drilling, the geological and seismic information is valueless. This can be seen from Exhibit E* which indicates that all significant post-drilling decisions are based on "proved" reserves which are those developed after drilling.

19. The first step of the post-bid stage is exploratory drilling. Usually within a matter of months, depending on the availability of offshore rigs and similar factors, the first well is drilled. This gives the exploration personnel their first concrete data upon which to base future reserve estimates. The first well determines whether hydrocarbons are present at that site, and if so, whether it is oil or gas. Also, well logs, core samples and other well data indicate the porosity of the hydrocarbon-bearing sands, if any, and the thickness of the sands at that point. However, the areal extent of the reservoir (whether it extends 50 yards or 5 miles from the well) is not known until wells are drilled, depending on the subsurface structure. The number of additional wells can vary widely but often are in the 15 to 20 well range.

20. After the first well is drilled, Mobil estimates "proved reserves" for the field. As more wells are drilled, more data becomes available and the estimate of "proved" reserves for the field is updated. The number varies widely but often it takes 20 or more wells for a field to be drilled sufficiently to obtain adequate data to make a reasonably accurate estimate of ultimately recoverable

reserves or total "proved" reserves. The field estimates for the first few years after the first well can change by several hundred per cent or more from year to year as additional wells are drilled before leveling off during the third year (or later if sufficient wells have not been drilled). See Exhibits F and G.*

Comparison of Speculative and Proved Reserves

21. Mobil classifies its reserves as "speculative", "prospective", and "proved." "Speculative" estimates have already been discussed. They are prepared prior to drilling solely for the purpose of preparing bids. Once drilling commences and oil or gas is discovered, it is classified as "proved" or "prospective." "Prospective" reserves are post-drilling reserves that are not quite as likely to be produced as "proved" reserves. Using a simplified example, a reservoir engineer might think a gas reservoir extends 1,000 feet in diameter based on one or two wells that have been drilled. He thinks, however, that it just might extend another 200 feet. The gas he believes recoverable from the 1,000 feet he would classify as "proved" and those from the additional 200 feet as "prospective." The decision involves a high degree of judgment and would differ between engineers. "Prospective" reserve estimates are used for some internal company purposes. The American Gas Association does not report prospective reserves. (Of course, the AGA did not report Mobil reserve data of any kind on South Louisiana since none was made available to it.) "Proved" reserves are the most significant. They are reasonably certain of being produced. Proved reserves are defined by the AGA and are the basis for their reporting. Proved estimates often vary between engineers/geologists, but they generally follow the AGA definition. Proved estimates are often used for stock offerings, bank

loans and reports to shareholders, and myriad other company purposes.

s/ H. R. HIRSCH
H. R. Hirsch

SWORN TO AND SUBSCRIBED BEFORE ME on this 1st day of October, 1973.

s/ MARY BERGINIDES
Mary Berginides

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* Incorporated herein by reference and made a part hereof.

** The Appendix is composed of true and correct copies of submissions made by Mobil to the USGS and correspondence from the USGS.

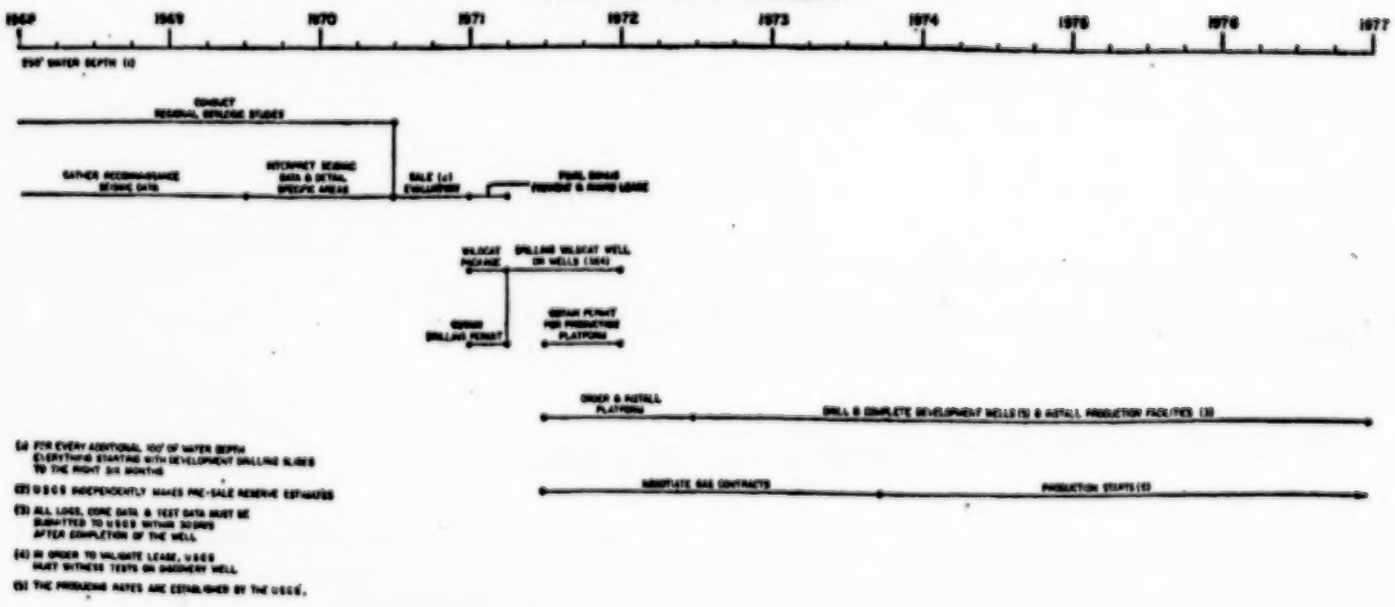
RESERVE ESTIMATES

Data File	Type of Estimate: Proved	Prospective	Speculative
Hydrocarbon Confirmation			
Well Penetration	Yes	Nearby	No
Bore Hole Logs	Yes	Nearby	No
Cores & Cuttings	Yes	Nearby	No
Formation Tests	Yes	Nearby	No
Production	Usually	Nearby	No
Geophysical and/or Geological Interpretations	Yes	Yes	Yes
Reservoir Thickness Calculations			
Bore Hole Logs	Yes	Nearby	No
Core and Cuttings	Yes	Nearby	No
Geophysical and/or Geological Interpretations	Yes	Yes	Yes
Reservoir Extent			
Well Penetration	Yes	Nearby	No
Geophysical and Geological Interpretations	Yes	Yes	Yes
Physical Determinations of Reservoir			
(Porosity, Permeability, Gas-Fluid Ratio, Water Saturation, Pressure, Temperature, Fluid Contracts)			
Accurate Measurements	Usually	Nearby	No
Engineering Data Projection Studies	Yes	Yes	Yes
Type Production			
(Oil, NGL, Gas)			
Measured	Yes	Nearby	No
Geological and Engineering Studies	Yes	Yes	Yes

EXHIBIT A

A-304

SIMPLIFIED OFFSHORE SALE & PRODUCTION DIAGRAM FROM INCEPTION TO COMPLETION



(a) FOR EVERY ADDITIONAL 100' OF WATER DEPTH EVERYTHING STARTING WITH DEVELOPMENT DRILLING SLIDES TO THE RIGHT SIX MONTHS

(b) USGS INDEPENDENTLY MAKES PRE-SALE RESERVE ESTIMATES

(3) ALL LOGS, CORE DATA & TEST DATA MUST BE SUBMITTED TO USGS WITHIN 30 DAYS AFTER COMPLETION OF THE WELL

(4) IN ORDER TO VALIDATE LEASE, USGS MUST WITNESS TESTS ON DISCOVERY WELL

(5) THE PRODUCING RATES ARE ESTABLISHED BY THE USGS.

EXHIBIT B

A-305

SALE EVALUATION SCHEDULE
OFFSHORE LOUISIANA

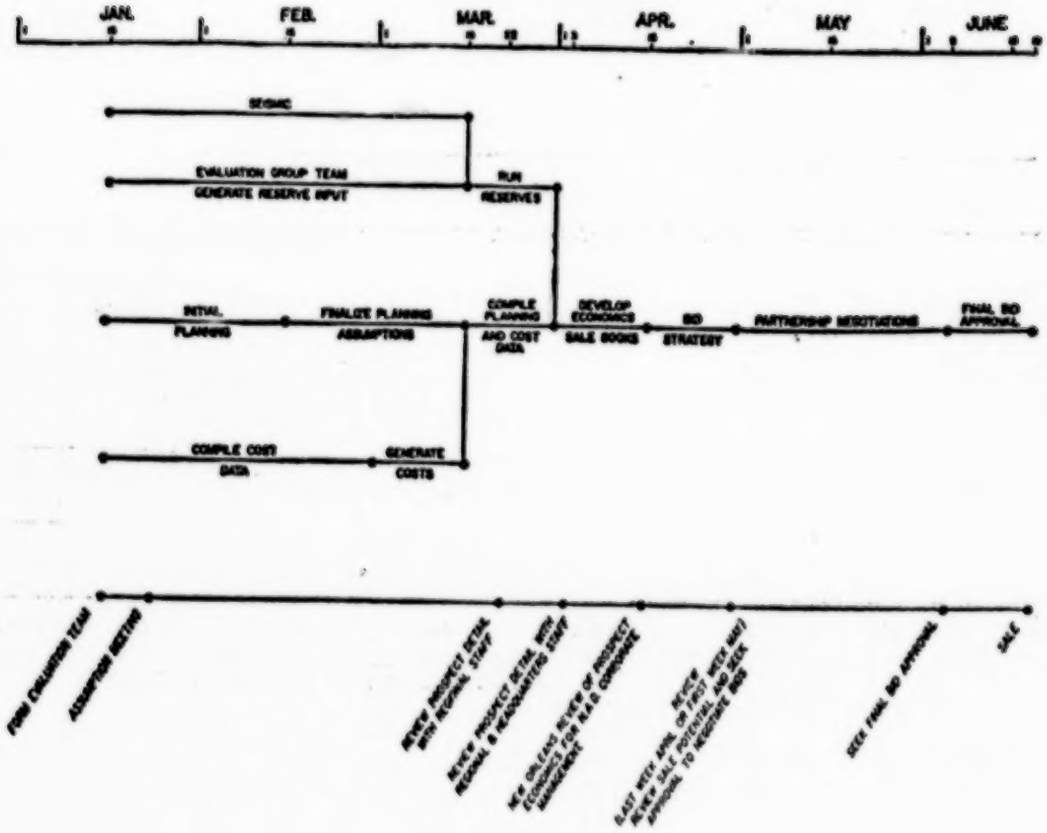
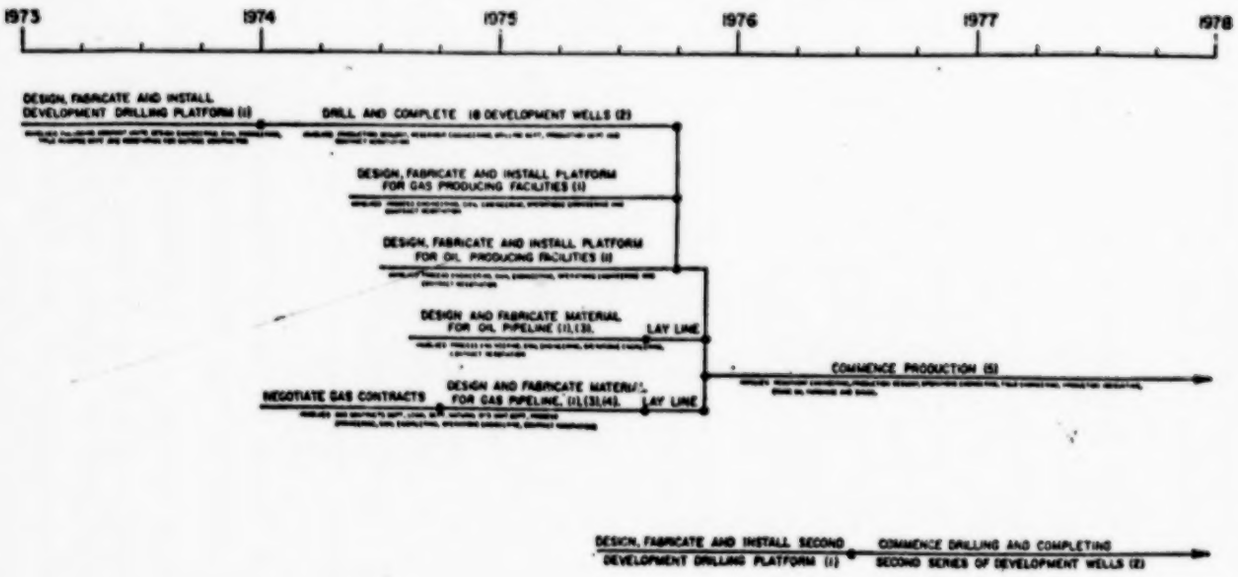


EXHIBIT C

A-306

SIMPLIFIED DIAGRAM FOR DRILLING, PRODUCING AND TRANSPORTING OIL AND GAS FROM LOUISIANA OFFSHORE



(1) PERMIT OBTAINED FROM CORP OF ENGINEERS FOR PLATFORM INSTALLATION

(2) DRILLING PERMIT OBTAINED FROM U.S.G.S. AND E.P.A. FOR EACH WELL. ALL LOGS, CORE DATA AND TEST INFORMATION IS SUBMITTED TO U.S.G.S. UPON COMPLETION OF EACH WELL.

(3) OBTAIN U.S.G.S., B.L.M., CORP OF ENGINEERS, DEPT. OF TRANSPORTATION AND VARIOUS STATE AGENCIES APPROVAL FOR OIL PIPELINE

(4) OBTAIN F.P.C. APPROVAL FOR GAS CONTRACT PRICE ALONG WITH APPROVAL OF AGENCIES REFERENCED IN (3)

(5) U.S.G.S. SETS PRODUCING RATES

EXHIBIT D

A-307

EXHIBIT E

MOBIL PROVED RESERVE ESTIMATE USES AND USERS

North American Exploration & Producing And Corporate Offices—New York City

Proved reserve estimates are used in reviewing and measuring the results of exploratory, development drilling, and secondary recovery projects and programs. The reserve estimates are also used in annual budget allocations, long range business planning, unitization participation, capital financing arrangements, and informational announcements to Mobil stockholders.

Southern Region Exploration Department Houston, Texas

Proved reserve estimates are used in measuring the success of exploration programs, for support data involving acreage acquisitions, seismic work and wildcat drilling in associated localities and similar geologic settings. The estimates are also used, in conjunction with other data, in estimating the speculative hydrocarbon potential in undeveloped portions of a productive trend in unexplored geologic provinces.

Southern Region Producing Department Houston, Texas & New Orleans, Louisiana

Proved reserve estimates are considered in arriving at investment decisions regarding drilling of field development wells, installation of offshore platforms, pipelines and other producing equipment, installation of processing facilities and waste disposal equipment, and inauguration of improved recovery projects. The reserve estimates are also used in evaluating purchase or sale of producing properties, processing plants, acreage holdings and pro-

duced gas. These estimates also influence decisions regarding staff levels and their location, forward business planning, research projects, capital recovery determinations as well as negotiation of treating and processing agreements. The primary responsibility for proved reserve estimate determinations rest with the Reservoir Engineering Section in the Producing Area offices being accomplished with the advice of the Exploration and Exploitation Geological Sections. Annually, proved reserve estimates are compiled, transmitted to Dallas Accounting and Computer Center and Exploration Services Center, which in turn assemble and distribute the Annual Reserve Survey. Periodic proved reserve estimate updates are made at shorter time intervals when new information dictates revision is appropriate.

Southern Region Planning Department Houston, Texas

Utilize proved reserve estimates from the Annual Reserve Survey in reviewing and/or constructing production projections with respect to long range business plans.

Southern Region Controller Department Houston, Texas

Utilize proved reserve estimates from the Annual Reserve Survey in reviewing recommendations regarding sales of producing properties and for special studies involving identification and appropriate disposition of marginal producing properties.

New Orleans & Houston Area Exploration Offices

The Area Exploration management and team members use proved reserve estimates to measure economic success of the exploration programs. Responsibility for calculation of proved reserves is with the reservoir engineering section, a segment of the Area Producing of-

fices. To aid in calculating the estimate, the exploration team makes available to the reservoir engineers the initial data concerning pay zones, structure maps and an outline of the estimated proved and prospective areas. Results of the calculation are the basis for the "Annual Reserve Survey" report.

Natural Gas Unit
Houston, Texas

Usage is occasional or periodic as opposed to constant or daily and data is taken from the Annual Reserve Survey.

Economics and Planning Section uses proved reserve estimates for economic analysis of nationwide gas reserves and projection of reserve trends.

Controls and Analysis Section uses proved reserve estimates for contract evaluation and in forecasting gas available for the Beaumont Refinery and other applicable installations.

Contract Administration and Regulatory Compliance Section uses proved reserve estimates for jurisdictional sales arrays. This statistical data presentation, distributed to Area Producing offices, reflects remaining reserves dedicated to specific interstate gas contracts.

Gas Development and Evaluation Section uses proved reserve estimates in conjunction with the evaluation of gas sales contract proposals.

Exploration Services Center
Dallas, Texas

Both proved and prospective reserve estimates, furnished by the Area Producing offices, by lease-reservoir are entered on computer disk files and stored at this

facility. At the end of each year these files are processed to produce the Annual Reserve Survey. Appropriate operating units receive a printout of the Annual Survey that serves as a source of reserve information for development, exploration and secondary recovery projects, lease studies and property sales. The disk files at ESC are also utilized to provide answers to management inquiries or to determine such information as gas reserves dedicated to various gas contracts in the Hugoton field.

At the time the Annual Survey is completed, top level summaries by fields and geologic provinces are created for New York management. These summaries are used for information studies by both NAD and Corporate as well as providing input for the Annual Stockholders Report.

The Basin Analysis Section at Exploration Services Center utilizes the same top level summaries for developing basin analysis statistics. This data is combined with industry information for completeness.

Annual oil and gas reserve data is made available to Dallas Accounting and Computer Center for capital recovery and ad valorem tax purposes.

Field Research Laboratory
Dallas, Texas

The Production Technical Services Reservoir Mechanics group uses proved reserves information in a general way to evaluate where their effort might be most effective. They use only Mobil's Annual Reserve Survey reports as a data source.

The Production Technical Services Recovery & Processing group use proved reserves information on a single reservoir basis as they work on that specific problem. They use reservoir data provided by the Engineering staff of the Area Producing.

Production Research's Production Mechanics group uses proved reserve data in a qualitative way when considering a well stimulation R&D effort to see if it is justified by the size of the target and potential benefits. The Engineering staff of the Area Producing offices are the source of information.

The Production Research Reservoir Mechanics group has made extensive use of proved reserves information obtained from the Annual Reserve Survey. Some of this data is also confirmed by contact with Area Operations personnel. This data was used to formulate a listing of candidate reservoirs where the Low Tension Waterflood Tertiary Recovery process might be applied. Some five or six additional lisitings have been made considering polymer and alkaline waterflood, miscible and thermal possibilities, and identification of carbonate reservoirs as improved recovery candidates.

Research Planning uses proved reserves data in project evaluations, technological strategies development, making technological forecasts, and for special studies. This data is obtained from the Annual Reserve Survey.

Exploration and Producing Accounting Department
Dallas, Texas

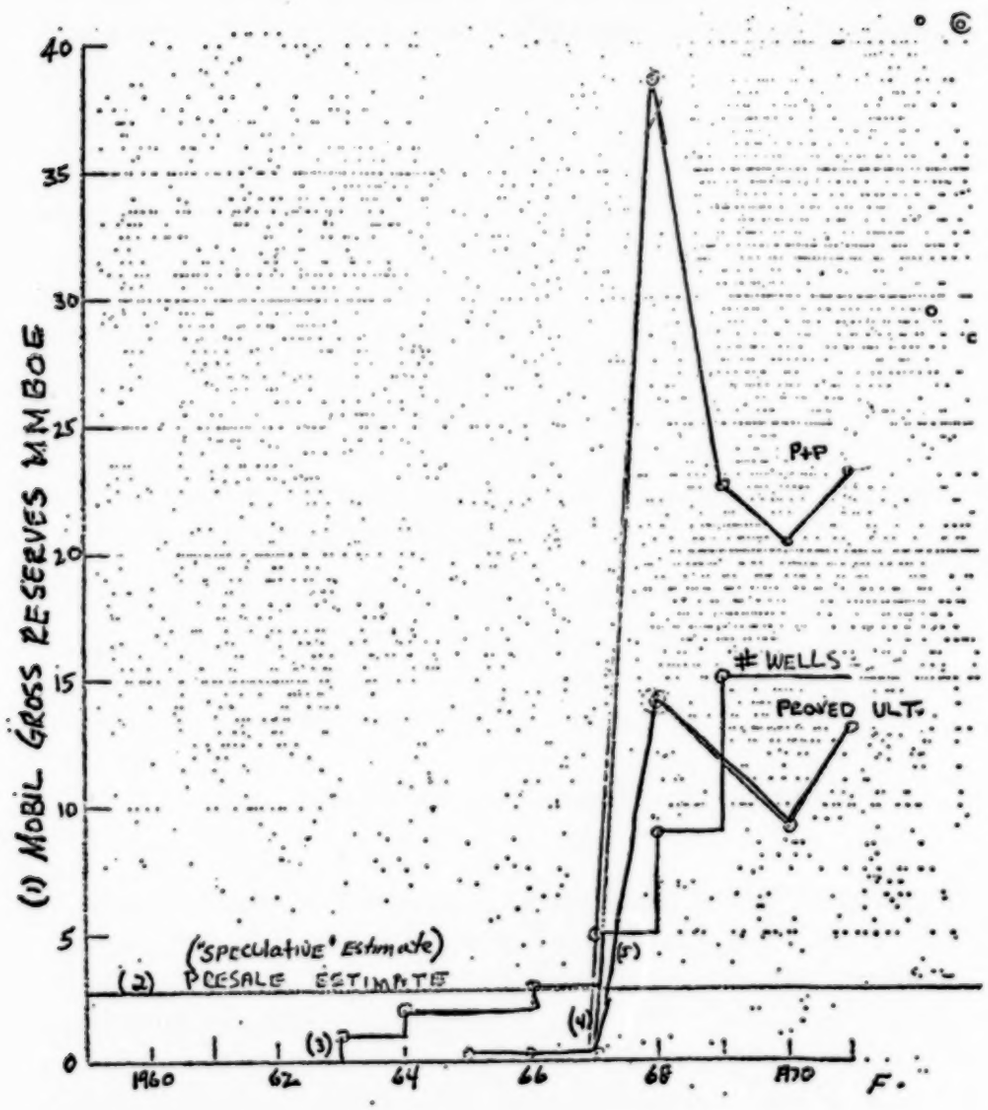
Proved Reserve Estimates, taken from Mobil's Annual Reserve Survey, are used in computing Capital Recovery which consists of three principal components: (1) Depletion of producing leasehold costs, (2) Unit of production depreciation, (3) Amortization of intangible drilling costs. The Department also uses the basic reserve estimate data in compiling Cost of Finding Studies and in the generation of Field and Lease Status Reports which are used by the Producing Area office.

Southwest Regional Tax Department
Dallas, Texas

Utilize proved reserve estimates from the Annual Reserve Survey in calculating depletion allowance which is considered in the company's Federal Income Tax Return.

EXHIBIT F

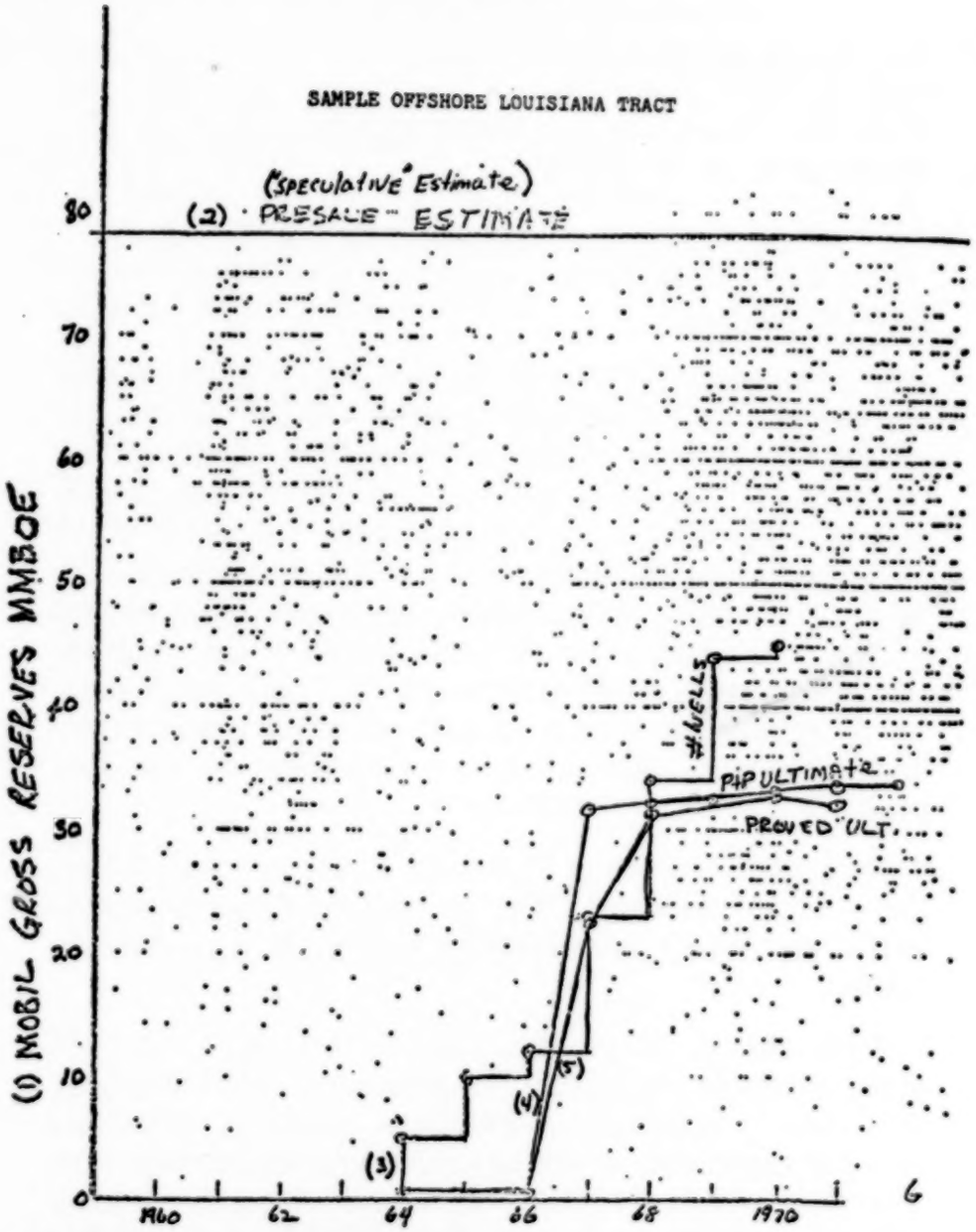
SAMPLE OFFSHORE LOUISIANA TRACT



(1) Also represents number of wells drilled
(2) Represents the pre-bid speculative estimate of total hydrocarbon reserves
(3) Represents the total number of wells drilled
(4) Represents as a single figure estimated proved and prospective hydrocarbon reserves.
(5) Represents proved hydrocarbon reserve estimates

EXHIBIT G

SAMPLE OFFSHORE LOUISIANA TRACT



(1) Also represents number of wells drilled
(2) Represents the pre-bid speculative estimate of total hydrocarbon reserves
(3) Represents the total number of wells drilled
(4) Represents as a single figure estimated proved and prospective hydrocarbon reserves.
(5) Represents proved hydrocarbon reserve estimates

August 23, 1972

Mr. Donald K. Tenney, Attorney
Federal Trade Commission
Sixth and Pennsylvania Avenue, N.W.
Washington, D. C. 20580

Re: FTC Investigation File No. 711 0042

Dear Mr. Tenney:

In accordance with your request at the conclusion of our discussions on August 7, 1972, we are writing to confirm our understanding of the current status of our negotiations. As we advised you, we are willing to submit in response to the Commission's subpoena duces tecum served on Rawleigh Warner, Jr. on November 29, 1971, information which can be produced without serious injury to the legitimate interests of Mobil Oil Corporation. It is understood that in making such production, we do so without waiver of any substantive and procedural objections Mobil has to enforcement of the subpoena.

With this reservation of Mobil's rights in mind, we believe, as we discussed, that we can produce documents which will satisfy specifications A through F of the subpoena.

With regard to specifications G through I, we will make available for inspection estimates and underlying data used in making such estimates, except for estimates or other documents which are extremely confidential even internally within the Mobil organization because of their critical relevance to future offshore bidding ("confidential documents"). Further, we shall not produce documents relating to bidding for offshore leases, other than the estimate portion of those documents (except for confidential documents) and such portions of the documents that relate to the preparation of the estimates.

We believe we can make available documents which will satisfy specifications J through L in the manner which we discussed.

In accordance with our discussion, we can be prepared to produce documents relating to fields which do not involve confidential documents on September 18th in Houston, if you wish.

As I discussed with you by phone, we are not yet in a position to advise you as to what number of fields involve confidential documents which we will be compelled to protect. I shall advise you with regard to this as soon as possible, hopefully within a week to ten days.

Please do not hesitate to call me if you have any questions regarding any of this.

Very truly yours,

HARRY M. REASONER

HMR:rk

cc: Mr. Charles F. Rice
Mr. John T. Marshall

FEDERAL TRADE COMMISSION
Washington D. C. 20580

BUREAU OF COMPETITION

September 5, 1972

Harry M. Reasoner, Esq.
Vinson, Elkins, Searls & Smith
First City National Bank Building
Houston, Texas 77002

Re: FTC File No. 711 0042

Dear Mr. Reasoner:

This is to acknowledge receipt of your letter of August 23, 1972, to Mr. Donald K. Tenney regarding your understanding of the current status of our negotiations as to a satisfactory return on the Subpoena Duces Tecum served on Mr. Rawleigh Warner, Jr., on November 29, 1971.

While your letter sets forth Mobil's views as to what it now believes is required of it to comply satisfactorily with the Subpoena, permit me to set forth in detail, in order to avoid any misunderstandings, the degree of compliance which we expect from Mobil Oil Corporation.

Specifications A, B, C, D, E, and F will be responded to in full.

Mobil will submit all estimates called for by Specification G. It is our position that all estimates prepared for Offshore South Louisiana acreage by employees of Mobil Oil Corporation pursuant to their duties as members of the AGA's South Louisiana Subcommittee are called for by Specification G. It is understood that some estimates and related documents are of a highly sensitive nature due to the upcoming September 1972 Offshore Louisiana Lease Sale. Should Mobil comply with the Subpoena prior to the September sale, production of the highly sensitive documents may be deferred until after the September sale. There will be no further deferral once that sale is completed. If still deemed highly sensitive by Mobil, we will consider placing said documents in the custody of a mutually acceptable third party.

Specification H will be responded to in full.

Specification I(1) is limited only to the extent that "related" documents need not, at this time, be furnished for estimates supplied pursuant to Specifications G(1) and G(2). Thus, only those documents which refer to, analyze, compare, comment on, and/or set forth G(1) and G(2) estimates need be submitted. As to Specification G(3) estimates, Specification I(1) is limited only in that all back-up data need not be submitted at this time. Mobil will be expected at this time to submit, as regards back-up data for each estimate called for by Specification G(3), only the immediate data used to make the estimate. Thus, for estimates arrived at volumetrically, Specification I(1) will be satisfied temporarily by supplying all the underlying numbers which were used in the formula including the recovery factor and the size of the reservoir(s). As for estimates arrived at by pressure decline curves, Specification I(1) will be satisfied temporarily by submitting the curve used. Except as limited above, Specification I(1) will be responded to in full.

Specification I(2) calls for documents relating either to field-by-field AGA estimates for Offshore South Louisiana or for areawide AGA estimates throughout the Nation. As regards areawide estimates, we require all "related" documents except those relating to the underlying geologic-geophysical information (back-up data). As regards field-by-field estimates for Offshore South Louisiana, the same type documents are required as for G(3) estimates under I(1).

As regards documents required under Specification I (3), members of this Bureau will view in your offices in Houston, beginning September 18, 1972, the complete field files of East Cameron Block 51 Field, Vermilion Block 54 Field, and Main Pass Block 94 Field. At that time, the documents from these files required by Specification I(3) will be designated. Only the types of documents so designated and all other similar documents pertaining to Offshore South Louisiana acreage need be produced. Such production will satisfy the requirements of Specification I(3).

Specification I(4) calls for all documents (including all back-up data) relating to any dedicated reserve estimate made from 1962 to date. As regards estimates for dedicated reserves for specific acreage (fields, leases, etc.) in the Offshore South Louisiana area, the same type documents are required as Specification I(1) calls for Specification G(3) estimates. Otherwise, Specification I (4) was limited for the time being to documents which refer to, analyze, compare, comment on and/or set forth dedicated reserves in an entire production region recognized by the Federal Power Commission.

Specification I(5) relates not only to documents sent to the United States Geological Survey, but also received from the United States Geological Survey as regards wells capable of producing in paying quantities in Offshore South Louisiana.

As regards Specification J, there will be no limitation on Specifications J(1) and J(4). These specifications must be responded to as they are written. As regards Specifications J(2) and J(3), there is no limitation in the specifications when Offshore South Louisiana acreage is involved; in all other cases, all related documents are called for except those relating to the underlying geologic-geophysical information (back-up data). As regards proved reserves outside of Offshore South Louisiana, reference is to reserves for an entire AGA area.

Specification K(1) is not limited to Offshore South Louisiana, but includes the Continental United States. As regards proved reserves outside of Offshore South Louisiana, the reference is to reserves for an entire AGA area. Except for acreage within Offshore South Louisiana, Specification K(1) is limited in that "related" documents need not be submitted at this time.

Specification L will be responded to in full.

The cut off date, except when otherwise stated in the specifications, will be July 1, 1972.

The preceding delineates Mobil's requirements for satisfying the Subpoena at this time. We reserve the right to require complete documentation at some later time on any specification which has been limited by this letter.

We are currently considering the matter of confidential treatment of documents produced under the Subpoena, adequate notice in the event of a decision to grant access to persons outside the Commission, a third party custodian, and the return of documents. Once these considerations are finalized and approved, final proposals concerning safe-guarding and the confidentiality of documents will be made. At the time of this notice, it will be appropriate to discuss the time framework within which the submission will be made and who will be required to appear at the Commission to testify concerning said production.

Sincerely,

/s/ James R. Hermsen
JAMES R. HERMSEN
Attorney
Bureau of Competition

September 13, 1972

Mr. James R. Hermsen, Attorney
Bureau of Competition
Federal Trade Commission
Washington, D. C. 20580

Re: FTC File No. 711 0042

Dear Mr. Hermsen:

We have your letter of September 5, 1972 setting forth "the degree of compliance" which you expect from Mobil Oil Corporation.

As I am sure you are aware, there are significant disparities between the requirements outlined in your letter of September 5, 1972 and the undertakings we assumed in our letter of August 23, 1972, pursuant to our conference of August 7, 1972. For example, the conclusion of the September 1972 Offshore Lease Sale will not eliminate the need for extreme confidentiality as to many documents because of their critical relevance to future offshore bidding. We cannot at this point go beyond the undertakings made in our August 23, 1972 letter and will proceed only on that basis.

We look forward to receiving your proposals as to the safeguarding and confidentiality of documents and to discussing with you further the mechanics and details of Mobil's proposed submission.

I want to reiterate the point made in our letter of August 23, 1972: We are making such production and cooperating only with the understanding that we are

not waiving any substantive and procedural objectives Mobil has to enforcement of the subpoena.

Very truly yours,

HARRY M. REASONER

HMR:rk

cc: Mr. Charles F. Rice
Mr. John T. Marshall

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

BUREAU OF COMPETITION October 5, 1972

Harry Reasoner, Esq.
Vinson, Elkins, Searls & Smith
First City National Bank Building
Houston, Texas 77002

Re: File No. 711 0042

Dear Mr. Reasoner:

This is to summarize the recent meeting that Mr. Jim Hermsen and I had with you and John Kennedy of Vinson, Elkins, Searls & Smith and John Marshall of Mobil Oil. We met in your offices on September 18 and 19, 1972, to discuss Mobil's return on Specification I(3) of the Commission's November 24, 1971 Subpoena. We reviewed what Mr. Marshall claimed were the complete files of East Cameron Block 51 field and Main Pass Block 94 field. We also reviewed some of the files pertaining to Vermilion Block 54 field where it was understood that Mobil had already attempted to eliminate items from this file which they felt were not responsive to the Subpoena. Since Mobil does not have a representative on the South Louisiana American Gas Association Subcommittee, no AGA files were examined.

The files in question were searched and inventoried. It was then agreed to at least temporarily exclude from the Subpoena certain documents otherwise called for by Specification I(3). These documents, for the most part, dealt with the details of day-to-day well operations. The following documents, should Mobil choose to make a voluntary return, were so excluded:

(1) Bottom Hole Pressure Survey

(2) AAODC-API Official Daily Drilling Report, Form 2T4

(3) Reports of Inspection Services by Tuboscope

(4) Intangible Costs (Sheet)—no number

(5) Tangible Costs (Sheet)—no number

(6) Authorization for Expenditure
Exploring and Producing
CO-256 EP (12-64)
Sheet 1

(7) Authorization for Expenditure
Supporting Data—Exploration and Producing Well
Cost Estimate
CO-256 EP (12-64)
Sheet 2

(8) Authorization for Expenditure
Supporting Data—Exploration and Producing
CO-256 EP (12-64)
Sheet 3

(9) Mud Programs

(10) Casing Programs

(11) Cementing Program

(12) Corrosion Control Recommendations

(13) Hydraulic Programs

(14) Fracture Program

(15) Barite Plug Procedure

(16) Drilling Well Control, Inc.
Engineers Daily Report

(17) Mobil Oil Company
Primary Casing Cementing Job Report

(18) Mobil Oil Company
Well Cost Estimate
CO-8113 (11-62)
X-6379 (3-61)

(19) Supplemental Well Cost Estimates

(20) Gas Sales Contracts, Amendments thereto, and the Correspondence relating thereto, except when these documents contain Specification G(3) estimates, economic studies relating to the contracts, or contain information which would be responsive to Specifications J or K

In addition, it was agreed that Specification I(3) very definitely called for production of the following items:

(1) Report on Federal Leases Acquired in March 1966 in Offshore Louisiana

(2) Mobil Oil Company
Well Cost Statement
CO-7087 (3-65)

(3) Prospect Summary and Analysis

(4) Wildcat Well Proposal Vermilion

(5) Proposed to Drill a Well

(6) Basic Assumptions File—Federal Offshore Lease Sale March 13-16, 1962 Offshore Louisiana—Evaluation of Recommended Prospects, Houston E&P Decision

(7) Post-Completion Wildcat Analysis

(8) Geological Resume

(9) Basic Assumption—Sheet

(10) Profit & Loss Analysis (printout of reserves and cash flow)

(11) Annual Review of Results (Inter-office correspondence)

(12) Profit and Loss Statement for Oil & Gas Producing Properties (computer printout)

(13) Profit and Loss Analysis (printout)

(14) Sales Detail (printout)

(15) Investment and Cost (printout)

(16) Income Tax Detail

These lists thus give some indication of the reach of Specification I(3) and also the degree to which we are willing to limit that reach as regards the files examined. We hope that these lists, together with our conversations with you, Mr. Kennedy and Mr. Marshall, will aid Mobil in complying with I(3). However, the Subpoena itself should be the starting point for all deliberations and we trust that in any case of doubt, the matter will be resolved by including the document.

While viewing the files, we did select a few items that were not called for by I(3) but which we identified as being required by other specifications. In this connection, we delineated various field reserve studies, reserve ledgers and reserve estimates contained in the files whose production G(3) would very definitely require.

During the course of negotiations on the Subpoena return, you have expressed reluctance about producing Mobil's reserve estimates and bid files for the tracts nominated in the September and December 1972 Federal Lease Sales for Offshore South Louisiana. It is quite clear that these estimates and bid files are called for by the Subpoena. However, you may exclude from your submission those reserve estimates which relate solely to tracts nominated in the September and December 1972 Lease Sales, which are not adjacent to acreage in which

Mobil has an interest. You may also exclude those reserve estimates for tracts adjacent to acreage in which Mobil acquired its interest on or after December 15, 1970 provided the tract in question is not also adjacent to acreage in which Mobil acquired an interest before December 15, 1970. Furthermore, you may exclude all bid files relating to such excluded estimates to the extent that such files do not contain data otherwise called for by the Subpoena. If Mobil does have an interest in adjacent acreage and said interest was acquired before December 15, 1970, then Mobil must submit all information on these tracts that is called for by the Subpoena. As in all cases, the exclusions are temporary and we reserve the right to require any excluded documents at a later date.

Mobil should now know exactly what will be required of it under the negotiated Subpoena. The only remaining issue would appear to be confidential treatment of documents deemed highly sensitive by Mobil. No decision has yet been made as to the degree of confidentiality that can be accorded to Mobil. As soon as a determination is made, we will advise you at once. We would expect Mobil to make a definite commitment at that time to return on the Subpoena as finally agreed upon.

In conclusion, let me thank you for the courtesies extended Mr. Hermsen and I while we were in Houston. Your continued cooperation is solicited.

Very truly yours,

/s/ Terry Lytle
TERRY LYTLE
Bureau of Competition

cc: Charles F. Rice, Esq.
John T. Marshall, Esq.

October 18, 1972

Mr. Terry Lytle
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Re: File No. 711 0042

Dear Mr. Lytle:

Thank you for your letter of October 5, 1972.

To be sure there is no misunderstanding, I wish to reiterate that we have not retreated from the position set forth in our letter of August 23, 1972 to Donald K. Tenney, and our letter of September 13, 1972 to James R. Hermsen. We are cooperating at this stage only with the understanding that we are not waiving any substantive and procedural objections Mobil has to enforcement of the subpoena.

While the exclusions made with regard to estimates and bid files in your letter of October 5, 1972, are helpful, as you are aware, they do not cover the entire category of extremely confidential documents which we advised you in our letter of August 23, 1972, that Mobil would not produce.

I would suggest that as soon as the Commission makes a decision on the degree and terms of confidentiality that will be offered Mobil, that we meet to discuss further the possibility of production by Mobil.

Very truly yours,

HARRY M. REASONER

HMR:rk

cc: Mr. Charles F. Rice
Mr. John T. Marshall

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

BUREAU OF COMPETITION Oct. 26, 1972

Harry M. Reasoner, Esq.
Vinson, Elkins, Searls & Smith
First City National Bank Building
Houston, Texas 77002

Re: File No. 711 0042

Dear Mr. Reasoner:

On October 25, 1972, the Federal Trade Commission approved the enclosed "Proposed Confidentiality Arrangement" which, if accepted by Mobil Oil Company, will govern the degree of protection that will be accorded Mobil's submission pursuant to the negotiated Subpoena.

In accordance with the suggestion made in your letter of October 18, 1972, to Mr. Terry Lytle, we propose a meeting during the week of October 30, 1972, at which time we hope Mobil Oil will be in a position to make a definite commitment to respond to the Subpoena. If after a review of the "Proposed Confidentiality Arrangement," Mobil Oil is still reluctant to submit certain of the documents called for by the negotiated Subpoena, you will be expected to identify these documents at the meeting.

In any case, Mobil Oil Company must make definite commitment to respond to the Subpoena by November 10, 1972. If an agreement cannot be reached at that

time, we will recommend enforcement proceedings be initiated.

Very truly yours,

/s/ James R. Hermsen
JAMES R. HERMSEN
Attorney
Bureau of Competition

Enclosure

cc: Charles F. Rice, Esq.
John T. Marshall, Esq.

Proposed Confidentiality Arrangement—
American Gas Association, File No. 711 0042

Pursuant to Section 4.10(c) of the Commission's Rules of Practice, all documents submitted constitute a part of the confidential records of the Commission. Under Section 10 of the Federal Trade Commission Act, any officer or employee who makes public any such information, without authority of the Commission or direction by court, is guilty of a misdemeanor and subject to criminal sanctions.

In addition to the above, the following procedure will be afforded with respect to data submitted pursuant to Specifications G, H, and I. Subject to the exceptions set out below, the Commission will not disclose the documents to any person, other than a member of the Federal Trade Commission, its staff or an outside consultant brought in to work on the subject investigation, without first giving the submitting part notice ten (10) days in advance of such disclosure.

The Commission exempts from the above ten-day notice provision its furnishing the documents to a committee or subcommittee of Congress, or to a court in response to a compulsory process. In the event any documents submitted pursuant to Specifications G, H, and I are furnished to a Congressional committee or subcommittee, or to a court, prior notice is guaranteed. If ten-day notice is not possible, then such notice as is feasible will be given.

All documents and data produced under Specifications G, H and I will be maintained at the Federal Trade Commission, 6th and Pennsylvania Avenue, N.W., Washington, D.C., except that documents of a highly sensitive nature as determined by the respective producer and Bureau staff will be transferred by the Commission immediately after production to a third party custodian.

Selection of the custodian shall be by mutual agreement between Bureau staff and the producers desiring a custodian; the fees of the custodian shall be apportioned among the participating producers. The Commission will remove the documents from the third party custodian only if it intends to please said documents or information therefrom to person(s) outside the Commission, intends to institute a formal complaint proceeding, or intends to use the documents or information contained therein in connection with any action it deems appropriate in the matter. Upon receipt of notice that the Commission desires possession of any or all of the documents, the custodian will immediately surrender all documents requested to properly identified Commission personnel. Submitting producers will be notified of the removal of any documents from the third party custodian by the Commission. Except for notes by Bureau staff and its consultants, no reproduction of any documents in the possession of custodian will be made. While viewing the documents, no person will be allowed in the viewing area except Bureau staff members and consultants to the Commission.

The Commission will make use of the documents and data only in connection with its current investigation, the scope of which is set forth in the Commission's Resolution dated June 3, 1971, in File No. 711 0042; and in connection with any action deemed appropriate by the Commission in this matter. All documents designated highly sensitive by Bureau staff and the respective producers will be returned should the Commission take no action in this matter.

As to those documents not submitted to a third party custodian, the term of this commitment shall be ten (10) years from the date of its acceptance, with no time limitation as to those documents submitted to a third party custodian.

November 10, 1972

Mr. James R. Hermsen
Attorney
Bureau of Competition
Federal Trade Commission
Washington, D. C. 20580

Re: File No. 711 0042

Dear Mr. Hermsen:

Thank you for your letter of October 26, 1972.

We do not find the Proposed Confidentiality Arrangement to be adequate. It would appear that the Commission would be free to release the documents to any congressional committee or to private litigants without giving any notice to Mobil. The improper publication of this material, either by a congressional committee or the misuse thereof by private litigants, could have disastrous consequences for Mobil. Accordingly, we cannot agree to produce highly sensitive and confidential material under such a confidentiality arrangement.

As you aware, Mobil has various other substantive and procedural objections to the enforcement of this subpoena which it would be forced to raise in any compulsory enforcement proceedings.

Very truly yours,

HARRY M. REASONER

173/9D

cc: Mr. Charles F. Rice
Mr. John T. Marshall

December 11, 1972

Mr. Donald K. Tenney
Bureau of Competition
Federal Trade Commission
Washington, D.C.

Re: File No. 711 0042

Dear Mr. Tenney:

I have reviewed your suggestion of December 11, 1972 with Mobil Oil Corporation: *i.e.*, the possibility of a partial production by Mobil under the subpoena, if the Commission would alter the proposed confidentiality arrangements to ensure a minimum of ten days notice of any proposed release of confidential data that Mobil has produced. The Commission would then seek enforcement of production of any documents not produced under this arrangement. It was understood that our discussion was for purposes of settling the controversy over Mobil's response to your subpoena, was purely tentative, and did not constitute an admission or commitment on the part of either party.

We have concluded that such an arrangement would not satisfy our major objections to the subpoena. Accordingly, we must respectfully decline to produce under the Commission subpoena and will, of course, urge our objections in full if enforcement proceedings are initiated.

Very truly yours,

VINSON, ELKINS, SEARLS, CONNALLY & SMITH

By HARRY M. REASONER
Attorneys for Mobil Oil Corporation

HMR:rk

cc: Mr. Charles F. Rice
Mr. John Marshall

Nos. 76-1432, 76-1434 and 76-1435

In the Supreme Court of the United States

OCTOBER TERM, 1976

STANDARD OIL COMPANY OF CALIFORNIA, PETITIONER

v.

FEDERAL TRADE COMMISSION

MOBIL OIL CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

TEXACO, INC., ET AL., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

MICHAEL KIMMEL,
Attorney,
Department of Justice,
Washington, D.C. 20530.

GERALD P. NORTON,
Deputy General Counsel,

JEROLD D. CUMMINS,
Acting Assistant General Counsel,

WILLIAM HORNE,
Attorney,
Federal Trade Commission,
Washington, D.C. 20580.

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OCTOBER TERM, 1976

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STANDARD OIL COMPANY OF CALIFORNIA, PETITIONER

v.

FEDERAL TRADE COMMISSION

No. 76-1434

MOBIL OIL CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

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TEXACO, INC., ET AL., PETITIONER

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FEDERAL TRADE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. A-1 to A-168) is not yet reported. The panel opinion of the court of appeals (Pet. App. A-209 to A-259) is reported at 517 F.2d 137. The orders of the district court (Pet. App. A-56 to A-64) are not officially reported but are set forth at 517 F.2d 159-163.

JURISDICTION

The judgments of the court of appeals *en banc* were entered on February 23, 1977. The petitions for a writ of certiorari were filed on April 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether enforcement of investigatory subpoenas issued by the Federal Trade Commission should have been refused or limited on the ground that a formal complaint arising out of the investigation might be met with the defense that an issue had been decided in an earlier proceeding before the Federal Power Commission.

2. Whether the relevance of documents sought by agency subpoenas may be determined by considering whether the documents are reasonably relevant to the formally stated purpose of the agency's investigation.

3. Whether the court of appeals erred in reassessing the relevance of the documents sought and the

burdensomeness of compliance, where the district court's assessment had reflected the application of erroneous legal standards.

STATUTES INVOLVED

The relevant portions of Sections 5(a), 6(a), and 9 of the Federal Trade Commission Act, 38 Stat. 719, 721, 722, as amended, 15 U.S.C. (Supp. V) 45(a), 46(a), and 49, are set forth in the Addendum, *infra*.

STATEMENT

This case arises out of a proceeding pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) 49, to enforce subpoenas for production of documents sought in connection with a nonpublic formal investigation by the Federal Trade Commission. The investigation stemmed from an unprecedented decline, beginning in 1968, in the estimates of proved reserves of natural gas reported by gas producers to the American Gas Association ("AGA") for the important Southern Louisiana area (Pet. App. A-4, A-6).[1] The purpose of the Trade Commission's investigation was not, however, limited to AGA reporting. The Commission's Resolution of June 3, 1971, stated (Pet. App. A-8):

> [The purpose of the investigation is] to develop facts relating to the acts and practices of * * *

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[1] The decline followed this Court's decision in the *Permian Basin Area Rate Cases*, 390 U.S. 747, which approved the Federal Power Commission's use of estimates of gas reserves in setting rates.

> [certain named corporations] to determine whether said corporations, and other persons and corporations, individually or in concert, are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act.

The more limited issue of the accuracy of reporting on natural gas reserves in the Southern Louisiana area previously had been raised in a rate-making proceeding before the Federal Power Commission. See *Area Rate Proceedings, et al. (Southern Louisiana Area)*, 46 F.P.C. 86, affirmed *sub nom. Placid Oil Co.* v. *Federal Power Commission*, 483 F.2d 880 (C.A. 5), affirmed *sub nom. Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283. All large producers who were parties to that proceeding, including the petitioners in the present case, had been required to answer questionnaires indicating the volumes of uncommitted proved reserves controlled by the producers in the Southern Louisiana area as of year-end 1968 and year-end 1969. 46 F.P.C. at 114. Based upon their responses, the Power Commission staff computed the estimated amount of uncommitted reserves available for sale. The Power Commission concluded that, while there were discrepancies between the figures developed by the Commission's

staff and the AGA reserve data, the two estimates were comparable "on the trends *they* reveal," and that the AGA calculations were "reasonably reliable for the [ratemaking] purposes used herein." 46 F.P.C. at 116, 118 (emphasis in original).[2] The Power Commission stated: "The evidentiary fact that most concerns us is not in dispute: the traditional trend lines for measuring adequacy of supply * * * are in a declining mode." 46 F.P.C. at 118. The Power Commission accepted a proposed rate settlement on July 16, 1971, noting that "its wide support helps to provide stability to prices in the area and relieve administrative burdens of the Commission, and to reduce the probabilities of future litigation." 46 F.P.C. at 110 (footnote omitted).[3]

In late 1970, the Trade Commission directed its staff to begin an informal investigation into the activities of natural gas producers in Southern Louisiana. In June 1971, the Commission instituted a formal investigation. The subpoenas were issued in November 1971, calling for various documents re-

---

[2] In determining what is a "just and reasonable" rate, the Power Commission is not required to give priority to any particular facts, and may use "any 'formula or combination of formulas' it wishes," so long as the final result "is within a 'zone of reasonableness.'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 797, 800. Although the Power Commission must consider antitrust principles such as those applied by the Trade Commission, it is not bound by them. *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271.

[3] The Trade Commission was not a party to the Power Commission proceeding, nor was it in privity with any party suggesting any error in the estimates of reserves.

lating to natural gas reserves in the Southern Louisiana area from 1962 to 1970, including petitioners' files on lease bidding, which contain estimates of reserves (Pet. App. A-7 to A-10).[4] Petitioners refused compliance and, in June 1973, the Commission initiated enforcement proceedings in the United States District Court for the District of Columbia (Pet. App. A-11).

In opposing enforcement, petitioners variously asserted that in light of the existence of the Power Commission ratemaking determination, collateral estoppel barred portions of the Trade Commission's investigation; that some of the documents requested were not reasonably relevant to the investigation; that the scope of the request was unduly burdensome; and that the Trade Commission had not promised adequate safeguards for confidential information (see Texaco Pet. 11; Pet. App. A-19, A-42 to A-44, A-57).

The district court ordered the subpoenas enforced only in a severely truncated form, holding (Pet. App. A-57 to A-58; emphasis in original):

> * * * [T]he subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission, and the

[4] A copy of a typical subpoena served on petitioners is reprinted at Pet. App. A-46 to A-55. The subpoenas seek data the Power Commission had not sought to obtain in its proceeding.

> Court being of the further opinion that the subpoenas [is] improper in other respects as well and should not be enforced as issued.

The court ruled that production would be required only of documents containing or underlying estimates of "proved" natural gas reserves (Pet. App. A-58) and not of documents "which contain estimates or evaluations of the volume of natural gas present or recoverable or ultimately recoverable" (Pet. App. A-51). Discovery was limited to the years 1969, 1970, and 1971, and to a random sample of 100 offshore fields.[5] In addition, the court ordered that the documents obtained relating to "proved" reserve estimates were to be used "for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves" (Pet. App. A-58 to A-59).

The Trade Commission appealed. A panel of the court of appeals substantially affirmed (Pet. App. A-209 to A-257). The court of appeals granted rehearing *en banc*, vacated the panel decision, and reversed the district court's refusal to enforce the subpoenas as issued (Pet. App. A-1 to A-168). Citing the "general rule [that] substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceed-

[5] The district court also imposed a restrictive protective order as to confidential documents (see p. 9, note 7, *infra*).

ing" (Pet. App. A-32; see *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509), the court held that "collateral estoppel cannot be invoked to limit enforcement of the FTC's subpoenas." The court also ruled that the issue of relevance was to be decided on the basis of the purposes stated by the Commission in its resolution initiating the investigation and that the subpoenas had been impermissibly limited by "speculat[ions] about the possible charges that might be included in a future complaint" (Pet. App. A-22); the court therefore refused to limit the subpoenas only to documents containing or underlying estimates of proved natural gas reserves and held that "the development and reporting of estimates at various stages of the investment and development process is reasonably relevant to the FTC's purpose" (Pet. App. A-25). The court further held that the district court's finding that compliance would be burdensome was "colored in substantial measure by an erroneous concept of the FTC's purpose, and rested at least in part on improper applications of collateral estoppel and relevance" (Pet. App. A-39).[6]

Since the litigation had already substantially delayed the Commission's investigation, the court, citing *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 401 U.S. 321, 340-341 (Pet. App. A-39 n. 48), pro-

[6] The majority also overturned, *inter alia*, the district court's restrictions of the subpoenas to random samples of gas fields and to the years 1969-1971 (see Pet. App. A-37, A-58 to A-60).

ceeded to review the record and concluded that the subpoenas were not unreasonably broad and that compliance with them would not be unduly burdensome (Pet. App. A-37 to A-42).[7] Two judges dissented.[8]

ARGUMENT

1. The court of appeals correctly held that enforcement of the subpoenas should not be refused merely because a complaint arising out of the investigation might be met with the defense of collateral estoppel.

Petitioners, other than petitioner Standard Oil of California, misconstrue the decision below as holding that principles of collateral estoppel are inapplicable to administrative agencies (see, *e.g.*, Texaco

[7] In addition, the court of appeals overturned the conditions imposed by the district court with respect to confidential portions of the documents (Pet. App. A-42). Acting on a settlement proposal made by the Trade Commission in post-argument negotiations, the court ordered the Commission "not [to] disclose any of the documents produced which the company designates as confidential to any person outside the employ of the FTC * * * without first giving the company ten days' notice of its intention to do so" (Pet. App. A-43 to A-44; footnote omitted). The negotiations had been conducted at the request of the court of appeals when the *en banc* argument indicated that the parties no longer disagreed on certain points concerning the scope of the subpoenas and protective order (Pet. App. A-171 to A-203).

[8] Judge Wilkey, joined by Judge MacKinnon, filed a dissenting opinion (Pet. App. A-69 to A-164). Judge Leventhal filed a concurring opinion (Pet. App. A-65 to A-67). Judges McGowan, Tamm, and Robb did not participate in the case (see Pet. App. A-208).

Pet. 21-24). In fact, the court of appeals held only that consideration of the question of collateral estoppel was premature in the context of a subpoena enforcement proceeding (Pet. App. A-29 to A-37). As petitioners acknowledge (Texaco Pet. 26 n. 52), the court specifically declined to "reach the merits" of any defense, based upon collateral estoppel, that they might make to a complaint issued by the Trade Commission on the basis of its investigation (Pet. App. A-35 to A-36).[9] Nothing in the decision bars petitioners from asserting such a defense at the proper time.

The scope of any agency's investigatory subpoena may not be limited by a possible collateral estoppel defense to an ultimate complaint. The role of courts in proceedings to enforce administrative subpoenas is strictly limited. See *Federal Trade Commission* v. *Crafts*, 355 U.S. 9; *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 199-201. In particular, potential defenses on the merits, including jurisdictional defenses, may not be asserted as a defense to enforcement of an investigatory subpoena. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501. See also *Oklahoma Press Publishing Co.* v. *Walling*, *supra*. The courts of appeals consistently have held that de-

[9] In his concurring opinion, Judge Leventhal states that he would have held that collateral estoppel is inapplicable to rate-making proceedings (Pet. App. A-65 to A-67). Cf. *Tagg Bros.* v. *United States*, 280 U.S. 420, 425.

fenses that may be raised against an administrative complaint are premature when raised in opposition to a subpoena. See, *e.g.*, *United States* v. *Empire Gas Corp.*, 547 F.2d 1147, 1151-1152 (T.E.C.A.); *Federal Trade Commission* v. *Markin*, 532 F.2d 541, 543-544 (C.A. 6); *Federal Trade Commission* v. *Feldman*, 532 F.2d 1092, 1095-1096 (C.A. 7); *Securities and Exchange Commission* v. *Howatt*, 525 F.2d 226, 229-230 (C.A. 1); *Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d 431 (C.A. 9); *Securities and Exchange Commission* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (C.A. 2), certiorari denied, 415 U.S. 915; *Federal Trade Commission* v. *Gibson*, 460 F.2d 605, 608 (C.A. 5).[10]

These principles are particularly applicable to the doctrines of *res judicata* and collateral estoppel, which "apply only when the subsequent action has been brought." *G. & C. Merriam Co.* v. *Saalfield*, 241 U.S. 22, 29; *Brandenfels* v. *Day*, 316 F.2d 375, 378 (C.A.D.C.), certiorari denied, 375 U.S. 824.[11]

[10] Petitioners cite cases applying the doctrine of collateral estoppel to administrative agencies (Texaco Pet. 22-23; Standard Oil Pet. 16-17), but in none was the doctrine applied to limit the enforceability of a subpoena.

[11] Petitioners incorrectly argue (Texaco Pet. 29) that the earlier proceeding before the Power Commission bars any inquiry into the matter by the Trade Commission. Even if the Power Commission had determined for all purposes that the AGA estimates were accurate, documents relating to the accuracy of those estimates might still be relevant to violations of the Federal Trade Commission Act. For example,

The court of appeals correctly noted (Pet. App. A-34; emphasis in original):

> Because a collateral estoppel defense rests on *factual* identities, an enforcing court to evaluate this defense must preview the ultimate complaint. In the instant case, the court must not only foretell the various theories which the FTC's evidence might support and all issues which conceivably might be raised in a FTC proceeding, but also define all issues decided by the FPC. The court then must determine if an issue decided in the first proceeding is identical to an issue to be decided in the second proceeding. Such an exercise is unwise, if not impossible, and is in clear violation of the Supreme Court's admonition in *Oklahoma Press* that an agency's inquiry should not be limited by "forecasts" of the "probable results."

In sum, the court of appeals' decision that the collateral estoppel issue was prematurely raised is consistent with the decisions of this Court and other courts, is correct, and does not warrant review by this Court.[12]

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it is possible that an illegal conspiracy to affect the AGA calculations failed of its objective.

[12] Of course, a contrary decision by the court of appeals would have conflicted with the authorities noted in the text; for that reason, the Trade Commission, in seeking *en banc* review, characterized the original panel's decision as one of unusual importance. But the *en banc* decision, which corrected the panel's errors, does not stand for a novel proposi-

2. Petitioners make varied contentions to the effect that the court of appeals erred in its analysis of the potential relevance of the subpoenaed documents.[13] However, far from "fashion[ing] a new and radically different test of relevancy" (Mobil Pet. 20), the court applied the settled standard announced by this Court in *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 652, *i.e.*, whether the material sought is "reasonably relevant" to an inquiry within the Commission's authority to conduct (Pet. App. A-20 to A-21 n. 23).

Petitioners contend that the formally stated purpose of the Trade Commission's investigation was impermissibly broad (Texaco Pet. 37-38; Standard Oil Pet. 12-13; Mobil Pet. 20). But the Trade Commission has broad powers of investigation, which this Court analogized to those of a grand jury. See *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 642-643. In view of those powers, and the Commission's broad-ranging statutory enforcement responsibilities, the Commission's statement of purpose in its resolu-

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tion that warrants review. Petitioner Texaco (Pet. 15-19) fails to appreciate this distinction.

[13] Petitioners do not seriously challenge the court of appeals' ruling that the subpoenas are not unduly burdensome, except to suggest that the Trade Commission's inquiry unnecessarily duplicated that of the Power Commission. But the present subpoenas call almost entirely for documents that were not sought by or submitted to the Power Commission. In any event, the court of appeals' decision concerning burden turns on the facts of this case and presents no issue warranting this Court's review.

tion commencing the investigation was not unduly broad. See, *e.g.*, *Far East Conference* v. *Federal Maritime Commission*, 337 F.2d 146, 151 (C.A.D.C.), certiorari denied, 379 U.S. 991.

Petitioners also argue that the court of appeals should not have looked to that purpose in evaluating the relevance of the documents sought but instead should have accepted petitioners' characterization of the Commission's narrower true purpose (Texaco Pet. 35-36; Standard Oil Pet. 12; Mobil Pet. 9-10). We know of no authority for this novel proposition. The court of appeals sufficiently answered it by stating (Pet. App. A-22 to A-23; footnotes omitted):

> The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. * * *
>
> * * * The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution. Here, however, the gas producers had posited—and the district court has apparently accepted—an erroneous interpretation of the scope of the FTC's inquiry, and they have then sought to limit the investigation to the confines of this distorted interpretation. There is no merit to the producers' contention that the FTC is only investigating possible underreporting of proved reserves to the AGA. The FTC's resolution does not even mention either the AGA or proved reserves; further, in addition to "conduct in the reporting of

> natural gas reserves," the resolution obviously incorporates a broad range of activities "relating to the exploration and development, production, or marketing of natural gas * * *." Although the FTC has never denied that reporting to the AGA is one aspect of its inquiry, it has repeatedly stated that its investigation cannot be so narrowly defined.
>
> Basically, the gas producers would have us believe that all the FTC has in mind is a *recomputation* of proved reserve estimates submitted to the AGA. On the contrary, the authorized inquiry envisions an examination of all phases of the estimating process.[14] * * *

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[14] The court therefore sustained the Commission's effort to secure petitioners' "reserve estimates in connection with bidding on or nominating leases; deciding whether or not to erect permanent platforms; compiling or inventorying total company reserves or supply; negotiating or contracting for the sale of natural gas, or for the joint or common exploration, development, production, purchase, or sale of acreage; obtaining bank loans; or filing depreciation expense schedules with the Internal Revenue Service" (Pet. App. A-23). Petitioner Mobil Oil argues, in connection with its bid files, that a "higher showing of relevance" is applicable when highly sensitive data is subpoenaed (Mobil Pet. 23-25). That claim is without merit. The cases cited by Mobil all involve discovery of sensitive evidence as between private parties or entities in adjudicative proceedings. None involves the rights of the government to obtain evidence needed for law enforcement purposes. The government's right to evidence, sensitive or otherwise, is measured, in this regard, by the "reasonable relevance" test. *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 652; *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 214-218; *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 291.

3. Petitioners contend that the court of appeals improperly set aside the district court's determinations concerning relevance and burden without holding them to be "clearly erroneous" or an "abuse of discretion" (Texaco Pet. 31-43; Standard Oil Pet. 10-14). In fact, the court of appeals explicitly recognized that those were the usual criteria (Pet. App. A-26 n. 29). In reversing the district court's limitations on the scope of the subpoena, however, the court of appeals found that the district court's assessment of relevance and burden had been tainted by its erroneous application of collateral estoppel principles, so that the district court's conclusions as to relevance were "inseparable from * * * its view of the applicable law with respect to the proper scope of the FTC's investigation" (Pet. App. A-25 n. 29). The court of appeals also held that the district court had applied an improper legal standard of relevance (Pet. App. A-21, A-58).

Rather than remand for reconsideration under proper legal standards, the court of appeals determined that in the peculiar circumstances of this case, in which an ordinarily summary proceeding had been long protracted, the public interest would be better served if the court of appeals itself reassessed the issues of relevance and burden under the proper legal standards and on the same record that was before the district court (Pet. App. A-25 n. 29, A-38 to A-39).[15] In doing so, the court of appeals did not

[15] There had been no testimony taken by the district court at any of the hearings, and the case was decided on the basis of affidavits and exhibits.

establish any new principle of appellate review in subpoena enforcement proceedings, and petitioners' contention in this regard does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1977.

ADDENDUM

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719 as amended, 15 U.S.C. (Supp. V) 45(a), provides in pertinent part:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Section 6(a) of the Federal Trade Commission Act, 38 Stat. 721 as amended, 15 U.S.C. (Supp. V) 46(a) provides:

> The [Federal Trade] Commission shall * * * have power—
>
> (a) To gather and compile information, concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

Section 9 of the Federal Trade Commission Act, 38 Stat. 722 as amended, 15 U.S.C. (Supp. V) 49, provides in pertinent part:

* * * [T]he Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1432

STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner*
v.
FEDERAL TRADE COMMISSION, *Respondent*

No. 76-1434

MOBIL OIL CORPORATION, *Petitioner*
v.
FEDERAL TRADE COMMISSION, *Respondent*

No. 76-1435

TEXACO INC., STANDARD OIL COMPANY (INDIANA),
THE SUPERIOR OIL COMPANY, INC., EXXON CORPORATION,
SHELL OIL COMPANY, *Petitioners*
v.
FEDERAL TRADE COMMISSION, *Respondent*

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 24, 1977

IN THE

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The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the petitions for writ of certiorari to review the *en banc* judgment of the United States Court of

Appeals for the District of Columbia Circuit rendered February 23, 1977. This motion is necessitated by the refusal of respondent Federal Trade Commission to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae,* the Chamber of Commerce of the United States, is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major association of business organizations, both large and small, in the United States. The erroneous decision of the court of appeals of February 23, 1977 has vitiated the constitutional right to judicial review of subpoenas issued by administrative agencies and has undermined the doctrine of administrative collateral estoppel.

Petitioners are major industrial enterprises. Their interest in the decision of the court below is beyond question; and they will undoubtedly be adversely impacted by it in the future. We respectfully submit, however, that the burden of the judgment, if it is permitted to stand as the law of the District of Columbia Circuit, will inevitably be borne as well by individuals and entities of lesser financial resource. Their need for the protections afforded by meaningful judicial review and the doctrine of collateral estoppel is as compelling as the interests of petitioners in a proper resolution of this case.

The interests of sole proprietors, partnerships, and small and medium-size businesses cannot be represented adequately by companies such as petitioners, which can sustain the burden of regulatory excess with less material damage to their ability to do business. As *amicus curiae* in this matter, the Chamber of Commerce proposes to express the interest of all of its members, whether large or small. The patent errors of the court of appeals should be reviewed by the Court with this perspective, along with the interests of petitioners, firmly in mind.

[1]Petitioners have consented, pursuant to Supreme Court Rule 42(1).

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States for leave to file a brief *amicus curiae* in support of petitions for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States, *amicus curiae,* hereby urges that a writ of certiorari issue to review the *en banc* judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 23, 1977.[1]

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the United States. Its direct membership includes more than 62,000 business firms, of which approximately 85 percent are small businesses. The membership of the Chamber of Commerce, taken as a whole, is not adequately represented by petitioners in this proceeding.

The judgment of the *en banc* court below deals a blow to fundamental rights of all persons and entities subject to the investigative jurisdiction of the Federal Trade Commission and every other agency of the Federal Government. The court of appeals vitiated the right guaranteed by the Fourth Amendment to the Constitution that parties subject to administrative subpoenas may seek *and may obtain* meaningful judicial review of those subpoenas. The court of appeals further overruled the doctrine established by this Court that the Government may not relitigate issues of fact determined in prior administrative proceedings.

That these erroneous determinations will severely affect petitioners is manifest on the record. But the impact of the judgment upon sole proprietors and small and medium-size businesses cannot be demonstrated adequately by petitioners. However great the injury to major industrial concerns from the judgment of the court of appeals, the most substantial losses may ultimately be incurred by enterprises endowed with the least substantial resources.

[1] Three petitions have been filed (Nos. 76-1432, 76-1434, and 76-1435) requesting review of the issues addressed herein.

The interest of the *amicus curiae* lies in the presentation of the effect of court of appeals' decision upon the *full spectrum* of American business.

SUMMARY OF ARGUMENT

Contrary to the *en banc* decision of the court of appeals, reversing the decision of the panel constituted originally to hear the consolidated proceeding below:

(a) A district court has jurisdiction in an enforcement proceeding to clarify the purpose of an administrative investigation and to limit the scope of a subpoena issued pursuant thereto based upon the constitutional and equitable precepts of relevance, burden, and fundamental fairness;

(b) The court of appeals may not substitute its judgment for the factual determinations of the district court in reviewing an administrative subpoena, in the absence of a finding that the district court committed an obvious error or abused its discretion; and

(c) An administrative agency may be estopped from relitigating factual issues previously determined by another administrative agency acting within the scope of its statutory authority.

These principles are grounded in the Constitution, settled principles of equity, and the decisions of this Court and other courts in the Federal system. Because they constitute fundamental safeguards against

burdensome overreaching by administrative agencies, their abandonment by the court of appeals is an error of the most grievous magnitude that will impact *all* business entities. Review by this Court is urgently needed to reconfirm them and to reestablish their place as immutable principles of administrative law.

REASONS FOR GRANTING THE WRIT

A. The Action of the District Court in Modifying the Subpoena Was Proper, and the Court of Appeals Erred in Reversing it.

The Federal Power Commission establishes rates for the sale of natural gas in interstate commerce based, in part, upon the supply of "proved" natural gas reserves. Beginning in 1961, the FPC held rate-making proceedings for the purpose of establishing area-wide natural gas rates for Southern Louisiana. These proceedings resulted in the establishment of tentative rates for the sale of natural gas in that area (*So La I*). Before the new rates became effective, however, the FPC commenced a second rate-making proceeding to reconsider its determination (*So La II*). The FPC's reconsideration followed a report issued by the American Gas Association (AGA) that the nation's reserves of natural gas were in decline.

In *So La II,* the accuracy of the AGA estimates of proved natural gas reserves was strongly questioned, and the FPC ordered that the accuracy of the AGA data be fully adjudicated. As a result of the proceedings in *So La II,* the FPC confirmed the reliability of those data and its decision was upheld on appeal.

Notwithstanding the FPC proceedings in *So La II,* the Federal Trade Commission, in late 1970, initiated

its own investigation into the reporting of natural gas reserves in Southern Louisiana. On June 3, 1971, the FTC issued a resolution directing the use of compulsory process and "defining" the nature and scope of the investigation as follows:

> To determine whether [certain named corporations] are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act. (A. 287.)

Pursuant to this resolution, which is utterly without practical dimension, the FTC issued exceedingly broad subpoenas to eleven natural gas producers seeking technical and highly confidential data respecting natural gas reserves. The producers immediately moved the FTC to quash these subpoenas. On June 27, 1972, the Commission denied the producers' motions to quash. Thereafter, the FTC sought enforcement of the subpoenas in the United States District Court for the District of Columbia against seven of the producer companies. The district court accepted evidence on the issues raised by all parties and conducted a full-scale hearing.

During the course of the proceedings, the court properly sought clarification of the undefined purpose of the investigation initiated by the FTC. In a colloquy between the court and counsel for the FTC the scope of the investigation was defined as follows:

> [FTC COUNSEL]: . . . What we are investigating is possible collusive conduct by the natural gas producers in the reporting of these reserves.
>
> . . . .
>
> [FTC COUNSEL]: . . . What we want to find out is whether or not in reporting natural gas reserves there has been collusive conduct in the way these estimates are prepared.
>
> THE COURT: Reporting them to whom.
>
> [FTC COUNSEL]: All right. Reporting them to the American Gas Association, because the American Gas Association data is the only available published data on these reserves. (A. 96.)

Relying on the evidentiary material presented to it as well as the representations made in open court by the FTC, the district court authorized the FTC to pursue its investigation to determine whether there existed any evidence of a conspiracy in the reporting of proved natural gas reserves by the gas producers. The accuracy of the data, it ruled, had been adjudicated and resolved in prior administrative proceedings by the agency charged with the statutory power and vested with the expertise to make such a determination. In this connection, the court found the subpoenas irrelevant, overbroad, and burdensome insofar as they sought data for the purpose of enabling the FTC to attempt to determine natural gas reserves or to question the validity or accuracy of the AGA natural gas reserve data previously verified by the FPC. Accordingly, the court modified the subpoenas to accommodate the stated objectives of the FTC while avoiding undue burden to the producers. Nevertheless, the FTC appealed.

On August 8, 1975, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit unanimously upheld the district court's order. In October 1975, the FTC filed with the court of appeals a petition for rehearing and suggestion for rehearing *en banc*. The petition was granted, and the matter was reconsidered by a diminished majority of the court of appeals consisting of six members. Upon rehearing, a four-judge majority reversed the district court and, in effect, the panel decision of the court of appeals. A two-judge minority of the court of appeals vigorously dissented, filing a 96 page opinion.

The court's reversal was based on two grounds. First, it held that the district court was without authority to consider the evidentiary material submitted to ascertain the scope of the FTC investigation and the relevance of the subpoenas. Relevance, according to the court, is to be measured only against the general purposes of the investigation. In this connection, it further held that the court was without authority to determine whether the subpoenas were burdensome or to take into account the proprietary nature of the materials sought. Second, the majority held that principles of administrative collateral estoppel are not applicable to administrative investigations and, therefore, that the district court erred in precluding the FTC from relitigating an issue determined upon a full evidentiary hearing by the FPC and upheld upon judicial review.

The *en banc* court of appeals, by holding that the relevance of an agency's subpoena requests may be measured only against a vague standard involving the "general purposes" of its investigation, vitiated the well-established jurisdiction of the district court to

review agency subpoenas under the dictates of the Fourth Amendment. This extraordinary ruling was denounced by the dissent as follows:

> By stripping the District Court, which has reviewed countless submissions and has held two full days of hearings, of any discretion in enforcing this FTC subpoena, our colleagues have totally undermined the concept of *judicial* enforcement of administrative subpoenas. (A. 89-90.)

It is uncontested that administrative agencies have broad powers to issue subpoenas. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). But, contrary to the *en banc* judgment, these powers are not without dimension. The Fourth Amendment *requires* that subpoenas be "limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See* v. *Seattle*, 387 U.S. 541, 544 (1967).

A district court has the power and the duty to review the enforcement of an administrative agency's subpoenas to keep them from being overly broad and, thereby, to prevent violations of the Fourth Amendment. *See, e.g., See* v. *Seattle, supra; Oklahoma Press Publishing Co.* v. *Walling, supra.* In *Chapman* v. *Maren Elwood College*, 225 F.2d 230, 234 (9th Cir. 1955), the Ninth Circuit Court of Appeals described a district court's authority in this regard as follows:

> There is no rule requiring a court to act against conscience. The proceeding [judicial enforcement of administrative subpoenas] is equitable in character. Equitable considerations should prevail. There is no power to compel a court to rubber-

> stamp action of an administrative agency simply because the latter demands such an action.

Further, where a district court, upon the consideration of evidentiary material, determines that an administrative subpoena is unduly burdensome, it may act to alleviate this burden by modifying the subpoena. *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *Adams* v. *FTC*, 296 F.2d 861, 866-867 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (196?); *Hunt Foods & Industries, Inc.* v. *FTC*, 286 F.2d 803, 811 (9th Cir. 1960), *cert. denied*, 365 U.S. 867 (1961). Modification or partial enforcement is an exercise of the district court's sound discretion and may be overturned on appeal only upon a clear error or an abuse of discretion. *FTC* v. *Lonning*, 539 F.2d 202, 211 (D.C. Cir. 1976); *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945).

In reviewing the order of the district court, the *en banc* court of appeals attempted to hold a trial *de novo*. It reviewed the subpoenas item by item, ordered the parties to engage in settlement conferences, and even received evidentiary material which had not been presented to the district court (A. 45, n.66). The court then substituted its judgment for that of the district court. The dissenting opinion describes the procedure as follows:

> The Trade Commission and a majority of this Court apparently would have us proceed as if there were on appeal here an order of the Trade Commission entitled to deference as an exercise of that agency's expertise.
>
> To the contrary, this is an appeal from orders of the District Court enforcing the Commission's

> subpoena with some limiting modifications. Accordingly, it is not the views of the Commission staff which must be accorded deference but the determinations of the District Court which must be upheld unless clearly erroneous or an abuse of discretion. (A. 88.)

A district court has the power, within its sound discretion, to decide whether administrative subpoenas are irrelevant or burdensome. Findings of the district court are not to be overturned in the absence of an abuse of discretion or clear error. This Court, in *United States* v. *Nixon,* 418 U.S. 683, 702 (1974), stated the principle as follows:

> Enforcement of a pre-trial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity of the subpoena most often turns upon a determination of factual issues.

In a recent opinion affirming an order of a district court enforcing another FTC subpoena, the District of Columbia Circuit itself stated the standard of appellate review applicable to a district court's determination of relevance as follows:

> A finding by the district court that documents are relevant and necessary to an inquiry by the FTC is essentially factual in nature and cannot be overturned unless the district court's finding is clearly erroneous.

FTC v. *Lonning, supra,* 539 F.2d at 210 n.14.

In the instant case, the district court clarified the scope of the FTC investigation and determined the relevance of the subpoenas after lengthy hearings, taking into account evidentiary material and the

unequivocal representations of counsel for the FTC. It employed the very procedure approved by the District of Columbia Circuit and other courts, where it has been determined that questions of relevance are inextricably involved with a district court's factual investigation of an agency's intended scope of investigation. *See, Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147, 155 (D.C. Cir. 1961); *Hellenic Lines Ltd.* v. *Federal Maritime Board,* 295 F.2d 138, 140 (D.C. Cir. 1961); *FTC* v. *Green,* 252 F.Supp. 153 (S.D.N.Y. 1966).

The dissenting opinion below aptly summarizes the error in the majority's approach:

> The majority has engaged in a standardless, directionless review of this case, and no euphemism can disguise this embarrassing fact. The majority opinion demonstrates this assertion by failing to even define the purpose of the FTC investigation which is being subject to *de novo* review, although the trial court had elucidated this quite well from FTC counsel. . . . The failure to focus on the FTC's purpose in turn causes the majority to roam into those areas committed by precedent to, and more appropriate for, the district court. (A. 163-64.)

After a full hearing, the district court determined that the FTC subpoenas were improper insofar as they permitted the FTC to attempt to determine natural gas reserves or to question the validity or accuracy of the AGA natural gas reserve data. The district court ruled that the FPC's prior determination of the accuracy of AGA data estopped the FTC from further investigation in this area. In reversing, the court of appeals held that it was inappropriate *as a matter of law* to consider the the issue of collateral estoppel at the subpoena enforcement stage of an FTC investigation.

Both this Court *and* the District of Columbia Circuit Court of Appeals have clearly stated that an agency is collaterally estopped from proceeding if a relevant factual issue has been previously determined in a contested hearing. *United States* v. *Utah Construction Co.*, 384 U.S. 394, 421-422 (1966); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Pacific Sea Farers, Inc.* v. *Pacific Far East Lines, Inc.*, 404 F.2d 804, 809 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). This Court's affirmation of the principle, in *United States* v. *Utah Construction Co., supra*, was as follows:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

384 U.S. at 421-22.

Factual determinations made by one agency bind all agencies of the Federal Government, since, for purposes of collateral estoppel, agencies of the same government are in privity with one another. *Sunshine Anthracite Coal Co.* v. *Adkins, supra*, 310 U.S. at 402-403.

That collateral estoppel is applicable to an administrative proceeding at the investigative stage was specifically affirmed in *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970). The court held that the Maritime Administration, an agency of the Department of Commerce, was collaterally estopped from reinvestigating and determining an issue previously decided by the Federal Maritime Commission,

an independent agency. The court (per Friendly, J.) set forth its rationale as follows:

> The reason for applying *res judicata* to administrative agencies is not only to 'enforce repose' but also to protect a successful party from being vexed with needlessly duplicious proceedings. . . . If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably.

Id. at 143.

In abandoning the doctrine of administrative collateral estoppel, the court of appeals did more than create a direct conflict with the Second Circuit Court of Appeals. Its ruling defies principles of this Court and places businessmen in regulatory limbo. As the court stated in *Safir*, the principle of estoppel must, to be effective, have its place at *all* stages of a proceeding.

B. The Judgment of the Circuit Court Destroys Fundamental Safeguards Against Regulatory Excess.

The *en banc* court of appeals intentionally departed from settled principles by eliminating a meaningful judicial review by the district court, by arrogating to itself discretion properly lodged in the district court, and by vitiating the doctrine of administrative collateral estoppel. In its fervor to grant the FTC *carte blanche* investigative authority, it has made a shambles of safeguards that are basic to our system of checks and balances. The new regulatory environment created by the court's judgment is of tremendous concern to the Chamber of Commerce, whose members may now be subject, in practically every case, to the unchecked investigative authority of the FTC.

Congress has vested in regulatory agencies extremely broad substantive and procedural jurisdiction. Few, if any, are more expansive than the authority of the FTC to investigate and remedy "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce." Federal Trade Commission Act, Section 5, 15 U.S.C. § 45. *See, FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972). It is undeniable that such authority, for whatever motivation, may be used in a manner that imposes inordinate, counterproductive burdens upon businesses of all sizes.

The instant case is a perfect example of such abuse. The FTC's resolution authorizing the natural gas investigation and thereby defining the proper scope of compulsory process is a sham. It is no more definitional (*i.e.,* restrictive) than the broad dictates of Section 5 of the Federal Trade Commission Act. The sole limitations of the resolution are that it relates to particular companies and to their activities in the petroleum and natural gas industries. (A. 287.)

By this vague resolution, the FTC sought to write itself a ticket into the files of the target corporations regardless of the burden to those firms. The district court and the original panel of the court of appeals sought properly to restrict the blanket authority that the FTC attempted to arrogate to itself while preserving for the FTC its ability to investigate the full ambit of perceived abuses within its jurisdiction. The limitations imposed were grounded in the Fourth Amendment to the Constitution, the equitable powers of the district court, and the doctrine of collateral estoppel, all as applied under the close scrutiny of the trial court upon a full, evidentiary hearing. The action of the

district court, sustained originally by the panel, was the reasonable, objective exercise of traditional judicial review under law.

The arbitrary reversal by the *en banc* court of appeals has emasculated the principle that administrative agencies, however broad their authority, will be checked by the courts when that authority is abused. To ask the question what safeguards are now available to enterprises which may be subjected to similar assaults by the FTC is to answer it. No protection may be expected under the constitutional doctrine that administrative subpoenas must be relevant and not unduly burdensome. The litigation by one federal agency (even one with the legally-designated expertise) of an issue possibly subject to the jurisdiction of another agency grants no assurance that expensive, counterproductive resurrections of the issue will not occur. In summary, there remains no objective check against investigative excesses.

That the result is contrary to law established by this Court and by circuit courts outside the District of Columbia is amply demonstrated by the petitions seeking review. The Chamber of Commerce respectfully urges the Court to examine the precedent from the perspective of all businesses, most of whom are endowed with a minute percentage of the resources of petitioners. Such businesses do not have the means to comply with oppressive regulatory demands and must be able to rely on the safeguards that the *en banc* court of appeals abandoned in the judgment rendered below.

The Chamber of Commerce submits that this Court may never have a more compelling opportunity to review and to reconfirm the proper role of the judiciary

in providing a check against administrative abuse. We urge the Court to seize that opportunity and to rectify the lower court's abandonment of the most fundamental precepts of judicial review.

CONCLUSION

Based upon the foregoing, a writ of certiorari should issue to review the *en banc* decision of the court of appeals.

Respectfully submitted,

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